90 Nos. 1657

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In the Supreme Court of the United States.

October Term, 1990

COMMONWEALTH OF MASSACHUSETTS
SEACOAST ANTI POLLUTION LEAGUE,
NEW ENGLAND COALITION ON
NUCLEAR POLLUTION, TOWN OF HAMPTON
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, et al.
Respondents.

Appendix to Petition
for a Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit
Volume II

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman
Thomas M. Roberts
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

In the Matter of	)	
	)	Docket Nos.
PUBLIC SERVICE COMPANY	)	50-443-OL
OF NEW HAMPSHIRE, ET AL.	)	50-444-OL
	)	
	)	Offsite
(Seabrook Station, Units	)	Emergency
I and 2)	)	Planning

MEMORANDUM AND ORDER
CLI-90- 03

1. Introduction

In the decision that follows, we decide to allow the Atomic Safety and Licensing Board's authorization of a full power license for the Seabrook Nuclear Power Station Unit I to become effective under our regulations during

the pendency of further appeals and other administrative proceedings.

The complicated procedural context in which this decision takes place requires some explanation, for we act today both in an adjudicatory and a non-adjudicatory capacity. As is well known, Seabrook is an adjudicatory proceeding, in which contested issues are resolved in court-type proceedings through a hierarchy of administrative tribunals: the Atomic Safety and Licensing Board, the Atomic Safety and Licensing Appeal Board, and ultimately the Commission. Those proceedings have been extensive, having commenced in the 1970's with applications to build Seabrook, and are continuing into the 1990's. The Seabrook operating license has been in litigation since 1981. The evidentiary hearings on emergency

planning issues alone, which began in 1986, totalled over a hundred days and fill transcript pages numbered in the tens of thousands. Where, as in these proceedings, issues are contested, the Commission acts in a quasi-judicial role and is therefore barred from communicating with the NRC staff (or any other party) relevant to the merits of the proceeding except upon the record of the proceeding, with reasonable prior notice to all parties.

Operating license hearings do not address all issues germane to a facility's readiness to operate, however, only those raised by a party to the proceeding. (The rules also establish standards for the admission of contentions.) To the extent that matters pertinent to the licensing decision are not part of the adjudication, the

responsibility for their resolution lies with the NRC's technical staff. When the NRC staff acts in this capacity, as a regulatory decisionmaker, it is subject to the supervisory authority of the Commission, and the restrictions that attend adjudicatory decisionmaking do not apply.

The NRC's rules provide one extra step in the oversight of licensing decisions, the "immediate effectiveness review." To explain, when an Atomic Safety and Licensing Board authorizes the issuance of a license, that decision, like that of a trial court, need not await the completion of all appeals to become effective. (As with courts, the Commission's adjudicatory procedures allow a party to file a motion for a stay of an adverse

decision.) Where the Commission's procedures differ from those of courts is that regardless of whether a stay request is filed, the Commission also conducts an "immediate effectiveness' review under 10 C.F.R. §2.764, to determine whether the Licensing Board's decision should be allowed to take effect. The "immediate effectiveness" review is largely informal, relying on the existing adjudicatory record and parties' written comments, and it is without prejudice to later adjudicatory resolution of issues still in controversy. As a rule, the effectiveness review examines the reasonableness of the Licensing Board's decision without reaching any formal and final decision that no further review

and revision of the decision could ever be required.

Today's decision therefore includes both adjudicatory and non-adjudicatory elements, divided into three sections following this one. In Section II we address, in an adjudicatory context, motions to revoke or vacate the Licensing Board's authorization of an operating license, and we deny those motions. In Section III, we conduct the "immediate effectiveness review" of contested issues described above. We also discuss, in a non-adjudicatory context, certain uncontested issues. We decide in favor of license issuance. Finally, in Section IV, we rule on stay motions, again in an adjudicatory context, and find that the moving

parties have not demonstrated their entitlement to a stay.

Today we also respond by separate opinion to an emergency planning question certified to us on October 11, 1989 by the Appeal Board in ALAB-922, 30 NRC 247 (1989); that response, which is in an adjudicatory context, forms an important part of conclusions regarding emergency planning for Seabrook.

In sum, our action today is to allow the Licensing Board's decisions to take effect, and thus to permit the licensing of the Seabrook plant -with, however, the recognition that administrative appeal processes (in which later, review of the Licensing Board's decision will take place) will continue.

II. Motions to Revoke or Vacate the Licensing Board's Decision

A. Background

1. Procedural Setting

All contested issues in the adjudicatory proceeding on the application for a full power license for Seabrook have now been finally resolved by the Commission, except for issues regarding emergency planning.1

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1 The active parties to the emergency planning phase of the proceeding are the Applicants, of which Public Service Company of New Hampshire (PSNH) is the lead owner, the NRC staff (Staff), and intervenors: the Attorney General of New Hampshire, the Attorney General of the Commonwealth of Massachusetts (MassAG), the Seacoast Anti-Pollution League (SAPL), the New England Coalition on Nuclear Pollution (NECNP), the Massachusetts towns of Amesbury, Newbury, Salisbury and the City of Newburyport (CON) and the New Hampshire towns of Hampton (TOH), Hampton Falls, South Hampton, Rye and Kensington. Hereinafter, the term "Intervenors" will be used for convenience to refer to group positions including MassAG, SAPL,

NECNP and others opposing the license, even though they do not specifically include all intervening parties.

The offsite emergency planning portion of the proceeding was bifurcated in order to commence hearings on the emergency plan for the New Hampshire portion of the plume exposure pathway emergency planning zone (EPZ), which had earlier been developed by the state of New Hampshire and submitted for Federal Emergency Management Agency (FEMA) review, without waiting for submittal and review of the plan for the Massachusetts portion of the EPZ - the Seabrook Plan for Massachusetts Communities (SPMC). A later hearing was held on the SPMC, which was developed and submitted by the utility in the absence of a willingness of Massachusetts' state and local

governments to provide such a plan.2

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2 In addition, one discrete issue was tried by the so-called "onsite"Board which had considered the adequacy of Applicants' onsite emergency planning as a part of the low-power decision. That issue dealt with the adequacy of the Vehicular Alert Notification System that Applicants provided in light of its inability to rely on local siren systems. The issue was decided in favor of license issuance. LBP 89-17, 29 NRC 519 (1989). The Appeal Board is presently considering Intervenors' appeal of this issue.

The hearing on the SPMC was also combined with a hearing on contentions submitted as a result of the full participation exercise conducted in June, 1988.

On December 30, 1988, the Licensing Board issued a partial initial decision finding that the New Hampshire Radiological Emergency Response Plan (NHRERP) satisfied NRC regulations and provided reasonable assurance that

adequate protective measures can and will be taken in the event of a radiological emergency (NHRERP decision).3

3/ The Board retained jurisdiction over an issue relating to evacuation time estimates for later resolution. It resolved this issue in LBP-89-32.

LBP-88-32, 28 NRC 667 (1988). Appeals were taken from that decision and were briefed and argued before the Appeal Board while the proceedings on the SPMC and on the June 1988 exercise were ongoing.

In mid-October 1989, in the course of reviewing the NHRERP decision, the Appeal Board certified a question to the Commission reflecting uncertainty on the part of the Appeal Board on the standard to be applied in judging emergency planning matters. ALAB-922, 30 NRC at

259. (As previously noted, the Commission responds to that question today in a separate opinion.) The Appeal Board followed the certification with a decision on November 7, 1989 disposing of certain appeals from the Licensing Board's NHRERP order. ALAB-924, 30 NRC --- (1989). ALAB-924 affirmed the NHRERP decision on all but four of the issues taken up, and on those it reversed and remanded. Two days thereafter the Licensing Board issued a 571-page opinion detailing its findings and rulings on the SPMC and exercise litigation (SPMC decision). LBP 89-32, 30 NRC--(1989). In sum, the Board found the requisite reasonable assurance was provided by the SPMC and also resolved the exercise contentions in favor of license issuance. In the concluding

pages of that order the Board stated:

> 13.8 Upon the issuance of LBP-88-32 and the issuance of this Partial Initial Decision, this Board would have decided all issues remaining in controversy in the Seabrook operating license proceeding. However, on November 7, 1989, the Appeal Board remanded to this Board certain issues decided in LBP-88-32 with respect to the NHRERP. (citing ALAB-924).
>
> 13.9 The Board has carefully read ALAB-924, evaluated the remanded issues, and studied the Appeal Board's directions

to this Board. We conclude that those issues and directions do not preclude the immediate issuance of an operating license for the Seabrook Station.87

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87 The Board will issue a memorandum following the issuance of this Partial Initial Decision explaining why ALAB-924 does not preclude the issuance of an operating license. Our explanations will include for example, the observation that the remanded issues do not involve significant safety or regulatory matters when considered in the context of the record of the NHRERP proceeding; our ultimate conclusions that the NHRERP provides reasonable assurance that adequate protective measures can and will be taken are not changed; the record of the NHRERP proceeding need not be reopened to resolve some inconsistencies and voids found by the Appeal Board, and that any needed implementing actions can be readily and promptly taken We shall also explain why the pendency of several motions to submit new contentions does not preclude the issuance of the operating license.

LBP-89-32 at 569.

Without delay, Intervenors MassAG, SAPL and NECNP moved the Appeal Board to vacate those portions of the SPMC decision which authorized the license.4 On November 14 the Appeal Board said that "consideration Of intervenors' motion can and should await the Licensing Board's promised explanation of the reasons why licensing authorization is appropriate, which undoubtedly will include some explanation of the relevance of 10 C.F.R. § 50.47(c)(1)." Appeal Board Order (unpublished), November 14, 1989 at 2. The Appeal Board established a schedule consistent with that view. By order of November 16, 1989 the Commission announced that "[a]lthough the Appeal Board..[had] ... set forth a schedule for future filings on

intervenors' motion, that motion will be decided by the Commission." Commission Order of November 16, 1989 at 2.5. In the same order the Commission said that the Commission itself would consider all applications for a stay of effectiveness of LPB-89-32. (We address later in this section Intervenors' challenges to this procedure.) On November 20, 1989 the Licensing Board issued a supplemental decision containing detailed findings in support of its earlier conclusion that the four remanded Issues did not prevent authorization of a full power license. LBP-89-33, 30 NRC (1989).

On December 1, 1989, Intervenors filed their 82-page supplemental motion and memorandum in support of their motion to revoke or vacate the license authorization.

4 The motion was filed with the Appeal Board on November 9, 1989; appeals of the Licensing Board's findings with respect to the SPMC and exercise have been taken.

5 By motion dated November 17, 1989, Intervenors sought reconsideration of the Commission's November 16 order. The motion is hereby denied except insofar as the Comission has previously granted portions of it.

2. Positions of the parties

Seeking revocation or vacation of LBP-89-32's authorization of license issuance, Intervenors essentially argue that the Appeal Board's reversal and remand in ALAB-924 divested the Licensing Board of power to authorize a license and that Intervenors have rights to a hearing on the remanded matters before a license can issue. In addition, they argue that the Licensing Board acted illegally in not awaiting the resolution of other pending matters

before authorizing a license. Those matters include motions seeking to litigate contentions on the September 27, 1989 onsite exercise (onsite exercise contention) and on the adequacy of the emergency notification system (EBS contention) the Commission's pending response on the question certifies in ALAB-922 (certified question), and the Intervenors' request for hearings on any decisions under § 50.47(c). Intervenors also assert that the Licensing Board erred in not conforming its SPMC decision to ALAB-924 in two particulars --- need for agreements with teachers and need for individual evacuation time estimates for special facilities-- where Intervenors say they made identical claims of deficiencies in both the hearing on the

NHRERP and the hearing on the SPMC and had been successful before the Appeal Board regarding the NHRERP. They also allege that the assumption of jurisdiction by the Commission over Intervenors' motion to vacate was legal error.

The Applicants argue that the Appeal Board's remand did not per se preclude license issuance. They also argue that even were the Appeal Board correct in ordering the remand on each of the four matters, a license can still properly issue pursuant 50.47(c)(1). Finally, they argue that the Appeal Board erred in requiring the remands. 6

The Staff also counters Intervenors' arguments by stating that the Intervenors mischaracterize the remand and the requirements placed on

the Licensing Board by the Appeal Board. The Staff maintains that in cases where the Appeal Board has found that further hearings are required, its mandate has been explicit and that the Licensing Board here reasonably and correctly "inferred that the remand order included 'traditional broad discretion' in resolving the issues, including a determination of whether the remanded issues were amenable to post-licensing resolution." Staff Response to Motion to Vacate, dated December 12, 1989 at 10, citing LBP-89-33 at 3-6. They also argue that the state of the record is sufficient to support the Licensing Board's finding of "reasonable assurance" and that 50.47(c) specifically recognizes that a license may be granted even in the face

of some deficiencies so long as they are not significant. Staff further argues that the "fundamental flaw" standard that is applied to contentions on emergency planning exercises is applicable to any decision on emergency planning, "for 'only fundamental flaws are material licensing issues." NRC Staff Response to Motion to Vacate, at 18, citing Long Island Lighting Co. (Shoreham Nuclear Power Plant, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

6 Applicants have petitioned the Commission for review of ALAB-924, as have Intervenors. The Commission has not yet decided whether to accept review.

B Commission Decision

1. Commission's Authority to Make this Decision

At the outset it is worth emphasizing that the Commission has acted properly and in accord with

long-standing practice in electing to consider the instant motion as well as Seabrook stay motions itself, as opposed to delegating such decisional authority to the Appeal Board. The Appeal Board acts only on authority delegated by the Commission; the Commission is responsible for its adjudicatory boards; and by regulation and a long line of case-precedent, the Commission has explicitly retained supervisory power to step in at any stage of a proceeding to decide any matter itself.7/

7/ See 10 C.F.R. § 2.764 (e)(3)(i) and (f)(2)(i); e.g., Public Service Company of New Hampshire, CLI-77-8, 5 NRC 503, 516 (1977)

The Commission's "authority to intervene and provide guidance in a pending proceeding is not limited by the terms of 10 C.F.P. § 2.768(a)

[regulation stating the ordinary practice for review]." 5 NRC at 516. The Convoission has inherent supervisory authority over adjudicatory proceedings, and "there is every reason why the Commission should be empowered to step into a proceeding..."8

8/ United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, 4 NRC 67, 75-76 (1970), quoted in CLI-77-8, 5 NRC at 516.

The motivation for the Commission to reserve matters to itself can derive from practicality and the need to avoid confusion where matters before the Appeal Board may be so intertwined with matters before the Commission that they should be decided together. Such a circumstance occurred in the low-power license stage of this very proceeding. See CLI-88-9, 28 NRC 567, 601 (1988)

(directing that any stay motions should be lodged with the Commission itself). A like motivaton governed the Commission's action here.

2. The Appropriateness of Relief In the Nature of Mandamus

Intervenors characterize the "immediate mandatory relief" they seek as "essentially a writ of mandamus."9

9/ The Comission grants Intervenors' "Motion for Leave to File a Supplemental Brief in Support of their November 13 and December 1, 1989 Motions for Mandatory Relief", darea January 16, 1990. The Comission has considered the brief in reaching this decision.

Supplemental Motion at 4. As Intervenors note, our rules do not expressly provide for such a mandate. Nonetheless, we would be willing to grant relief of this sort in appropriate circunstances. Borrowing from judicial case-law on mandamus, it is clear that

such "drastic" relief is warranted only in unusual circumstances. In Re: Thornburgh. 869 F.2d 1503, 1508 (D.C. Cir. 1989). Moreover, relief in the nature of mandamus is available only whtre there is a failure to obey a clear direction to perform a nondiscretionary duty and where no other relief is available. Garem. v. Heckler, 746 F.2d 849, 652 (D.C. Cir. 1984). The issue before us then is whether, as a result of the decision in ALAB-924 and the pendency of the various other cited matters, the Licensing Board had a clear, nondiscretionary duty to withhold any full power license authorization. For the reasons which follow we find that it did not and deny the relief requested.

a. First of all, nothing in ALAB-924 by its terms precludes a full power authorization pending completion of the remand proceedings. The four matters were reversed and remanded to the Licensing Board for further actions consistent with the opinion, ALAB-924 at 70, but no specific directions were given with regard to the effect of the opinion on a possible future license authorization.

Second, a review of NRC rules and prior NRC decisions does not suggest the existence of any clear, nondiscretionary duty on the part of the Licensing Board to delay full power authorization pending completion of remand proceedings cr resolution of all pending matters. In fact, a review of prior precedents indicates past examples of where, as

were, permits or licenses were authorized while remand proceedings and motions were still pending. 10/

10/ Public Service Company of New Hampshire CLI-77-8, 5 NRC 503, 521

Prior practice suggests that where there is a remand or pending motion the matter of license or permit issuance must be considered on a case by case basis.

Third, and most importantly for this case, the authority of the Board to authorize issuance of a full power license notwithstandina pendency of remands and motions relating to emergency planning issues can be traced to a specific provision of the NRC's emergency planning regulations. Under § 50.47(c) failure to meet offsite emergency plannino standards "may result in the Commission declining to issue an

operating licerse" (emphasis added), but does not require this result because an applicant may still show, inter alia, that the deficiencies "are not significant for the plant in question.' Accordingly, if a finding can be made that an emergency planning deficiency detemined to exist on appeal (1977); Consumers Power Co. (Midland Plant Units 1 and 2), ALAB-458, 7 NRC 155, 159-60, 169-70 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, LBP-85-53, 20 NRC 1531 (1984). See also Oystershell Alliance v. NRC, 800 F.2d 1201 (D.C. Cir. 1986) (per curiam) upholding issuance of a full power license notwithstanding pendancy of motions to reopen.
is not significant, or that an emergency planning issue left unresolved as a

result of a pending remand or motion is not significant, then a full power license can still be authorized. In effect, § 50.47(c) creates two classes of litigable emergency planning issues - those "significant" issues which must be addressed fully and resolved favorably by the Licensing Board before full power licensing, and those which are not significant and which can be resolved by the Licensing Board after license issuance.

We therefore reject the fundamental premise of Intervenors' argument that the issues remanded in ALAB-924 must be considered material factors to license issuance and "therefore must be resolves completely on their merits before license issuance. We agree that the remanded issues are relevant to the

licensing proceeding as a whole, since a positive resolution of them will support a finding of compliance with 10 C.F.R. § 50.47(b) emergency planning standards and therefore support license issuance. But all issues which are relevant to compliance with 10 C.F.R. § 50.47(b) emergency planning standards are not necessarily material to license issuance because, under 10 C.F.R. § 50.47(c), compliance issues may not be significant and therefore need not be resolved prior to license issuance. 11

11/ Safety issues, including emergency planning issues, can also be categorized in terms of the Licensing Board's duty to complete the proceedings itself as opposed to referring the matter to the staff for informal resolution. A Licensing Board may refer minor matters which in no way pertain to the basic findings necessary for issuance of a license' to the Staff for post hearing resolution. Consolidated Edison Co. of N.Y.: Inc. (Indian Point Station, Unit 2) LLI--74-23, 7 AEC 947, 951-52 (1974);

Public Service C2m"n ot Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-461, 7 NRC 313, 318 (1978); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-788, ZO NRC 1102, 1159 (1984). And, with respect to emergency planning, the Licensing Board may accept predictive fencings and post hearing verification of the formulation and implementation of emergency plans. Philadelphia Electrlc Co. (Limerick Generating Station, Units I and 2),ALAB-836, 23 NRC 479,-84-95 (1986). Completion of the minor detailsof emergency plans are a proper subject for post hearing resolution by the NRC staff. Kansas Gas and Electric Co. (Wolf Creek Generating Station, Unit 1), LBP-84-26, 2"RC 53, 61-62 (1984).

b. With particular regard for the pendency of the motions to reopen on the onsite exercise and on the EBS contention, we read the Licensing Board's decision in LBP-89-33 as contemplating a full power license authorization so that the Commission could commence its own review of full power licensine under § 2.764, see

LBP-89-33 at 38, but also recognizing that its rulings on these motions could require that the full power license authorization be vacated. The Board's decision need not be read, as Intervenors would have it, as holding necessarily that there would be ro ruling on the pending motions until after license issuance. In any event, Intervenors' complaints about the possibility of license issuance during the pendency of these motions is now moot since both motions have now been decided by the Licensing Board. Since we respond to the certified question today, Intervenors' concern about license issuance while this matter is pending is moot as well. 12

12/ 12 Intervenors' concerns about the need to conform the Board's SPMC decision to ALAB-924 and request for

hearing on / 50.47(c) issues are addressed later in this opinion in sections IIIA.L. and IIIA.3.

In sum, we hold that there was no non-discretionary legal duty on the part of the Board to withhold full power authorization because of the decision in ALAB-924, and that issues raised by Intervenors pertaining to the pendency of the two motions to reopen and the certified cuestion are now moot in any event.

In this opinion we are treating the decision In LBP-89-31 as, in effect, a supplemental initial decision, and including it as part of our effectiveness review under § 2.764. In this context we will address, in some detail, the reasonableness of that decision, including the application of

10 C.F.R. § 50.47(c) to each of the four remanded issues. 13/

13/ On November 15, 1989 Intervenors filed a request for a hearing to the extent a full power license authorization might be based on 10 C.F.P. / 50.47(c)(1). Since we are clearly basing the license authorization on this provision of the Commission's rules, the hearing request must be addressed by us.

There is no doubt that Intervenors have been heard before the Comission on whether the matters reversed and remanded by ALAB-924 are significant and therefore must delay license issuance. These views have been expressed forcefully and at great length in the various written papers filed with us. We find that the written papers before us are adequate for us to address the reasonableness of the Board's conclusions. Further, neither we, nor

the Licensing Board, have relied on facts outside the evidentiary record in reaching conclusions about significance; no new evidence was adduced or considlred. And intervenors' hearing request fails to suggest how the existing record may be inadequate and fails to indicate whether, or if so, in what particulars they will offer additional evidence. Given this, we see no need for additional evidentiary hearings on / 50.47(c) significance issues. Any unfairness which may have resulted from the Board not having invited comment before making its findings on significance has been removed by the written pleadings, which were filed subsequent to the Board's findings, and our careful consideration of these pleadings.

Accordingly, if construed as requesting an opportunity to be heard, Intervenors flovember 15, 1989 motion is now moot; construed as a request for additional evidentiary hearings, the request is denied.

III. Immediate Effectiveness Review

A. Effectiveness Review of LBP-89-33 (Supplemental Memorandum)

1. LETTERS OF AGREEMENT

Among other things, emergency response plans must ensure that arrangements have been made for "requesting and effectively using assistance resources." 10 C.F.R. § 50.47(b)(3). See also 10 C.F.R. §50.47(b)(1). Associated regulatory guidance provides:

> Each organization shall identify nuclear and other facilities. organizations or incivioUals which can be reieea upon in an emergency to provide assistance. Such assistance shall be identified and supported by appropriate letters of agreement.

NUREG-0654/FEP,A-Re P-1 (Rev. 1), "Criteria for Preparation ara Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plarts" (Nov. 1980) at II.C.4. In Section 2 of LBP-88-32 the Licensing Boara considered various challenges to Letters of Agreement (LOAs) obtained by the Applicants pursuant to this regulatory guidance. As a preliminary matter, the Board restated its earlier

ruling 14 that Applicants dc not need to sign LOAs with, inter alia, schools and school personnel because the,, are "recipients" of evacuation services and LOAs are required only for "providers" of such services. LBP-88-31- at 673.

In Section 7 of LBP-88-32 the Licensing Board considtred the general issue of human behavior in emergencies including contentions asserting that teachers would abandon their normal roles in the face of a radiological emergency. In the course of discussing teacher roles during an emergency, the Board made the following observations:

> 7.9. In general terms, the teachers would have very simple responsibilities in the event of an emet,gency requiring early

dismissal and evacuation. They would be responsible for accounting

14 Memorandum and Order, May 2, 1986 (unpublished).

for the children uncer their direct care, taking them to a central place in the school (cafeteria, for example) for accountability, anc Ccing with them on school buses to their evacuation destination. E.g., Tr. 4014.

7. 10. According to Applicants, teachers are not being calltd upon to co anything under the plan that they would not normally do in any emergency, or for that

> matter, on any regular day; they are viewed by the planners as recipients of services rather than as emergency workers or providers of services. Tr. 3356-57; see FEMA Dir., ff. Tr. 4501, at 48. However, we believe that, to the extent that teachers would be expected to accompany pupils in an evacuation rather thati leaving in their own transportation, the teachers should be regarded as service providers.

28 NRC at 7/'-9-30. The Eoard did not, however, t-efer back tc its earlilr discussion uf LOAs nor indicate that LOAs might be needed from teachers.

The Appeal Guard approved the Licensing Board's distinction between providers dno recipients as being a sensible basis for determining the need for LOh's. ALAB-924 at S. The distinction, in the view of the Appeal Boaro, "recognizes that LOAs need not be sought from everyone involved in the emergency response process; rather, they can be limited to those who contribute assistance services." However, the Appeal Board believed, as argued by Intervenors, that the Licensing Board's finding, in the Human Behavior section of its decision, that teachers are I'service providers" to the extent they would be expected to accompany pupils in an evacuation was inconsistent with its earlier ruling that teachers were

"recipients" rather than "providers" of services. Id. at 9.

The Appeal Board examined the Licensing Board's reasoning in termina teachers "service providers' and found that the Licensing Board had looked to what teachers are normally expected to do; i.e., to the extent that teachers are beina asked to do something not within the scope of their normal duties, they cease to be 'recipients" and become "providers The Appeal Board then addressee the NRC Staff's argument that teachers, in being asked to accompany children on buses, were nGt beina asked "to do anything other than what they rormally do -continue to supervise ana assist the children who have been entrusted to their care, which, the. evidence showed, is & duty teachers have

historically performed in both normal dnd emergency situations NRC .*staff Brief at 7. While the Appeal Board indicated that the Staff's conclusion may be correct, it rejecttd the evidence supporting that conclusion (which showed that school personnel do not generally abandon their rule as student custodians in times of emergency) as not "addressLing7 the issue of whether school personnel acting in that role are orainarily expected to accompany their students in an evacuation

A. ALAB-924 at 10. Thus the Appeal Board remanded this matter for further explanation "with the direction that it resfilve the existing inconsistency in its interpretations of the role of school personnel in an evacuation and determine whether any

LOAs should be obtained from school personnel." Id. at 11.

In its supplementary memorandum, the Licensing Board explained the context of the apparent inconsistency: in the LOA section of its decisior the term "service provider' 'has a special regulatory meaning ... flowing from NUREG-0654, II.C.4" (LBP-89-33 at 10) but in the Human Behavior section of its decision it used the term in the context of detemining

15 While the evidence proferred by the Staff nlay not be "definitive" (see ALAB-924 at 10) as to this issue, it is not immediately clear to us why it is not sufficiently probative as to resolve this issue.

whether teachers would abandon a particular role -- the role ot a custodian in evacuatine %with the children. 16 See id. at 9-10. "No party argued, as a human factors consideration, that the likelihood of teachers evacuating with students would be enhanced by LOAS. It was without any thought of the LOA requirements that the Board deemed teachers evacuating with students to be providers of services." Id. at 10.

The Board did not view this matter as a significant safety issue because it remained convinces "that sufficient numbers of school teachers will accompany school buses in those cases where they are neeaed" based on its "configence in the inherent aegication and sense of res;crsibility of school

personnel." Id. at 9. Thus the remanded issue Gic not cause the Board to charge its "ultimate conclusion that school children can and will be safely evacuated." Id. at 11.

Comission Conclusion

We believe that the Board's decision that this remanded issue does not raise a significant substantive issue regarding emergency planning

16 The Licensing Board noted that, contrary to the Appeal Board's understirding (see ALAB-924 at 10, n.24), the Board did not intend to limit its findings with respect to role abandonment to the roles of teachers in acccunting for their students and seeing them to the bus. See LBP-89-33 at 8-9. Rather, those findings do not 'stop at

the school Fu-s steps. If needed, school personnel will stay with their charges until they are safe." Id. at 9. The Board appears to be saying that the distinction it drew betzee-n teachers in the role of accounting for students and seeing them to the buses and in the role of riding the buses was meant as a distinction between what all teachers are expected to do and what only some teachers are expected to do (the rest being free to depart in their own vehicles). The distinction was not meant as a conclusion that the latter teachers were transformed into "service providers" within the regulatory mlaning of NUREG-0654, II.C.4.

adequacy is a reasonable one. 17 First, it-may well be that the Licensing r.oard has now provided the explanation sought

ty the Appeal Board. Second, it does not appedr that there is any reason why the evacuation of school children will be celayed or will not occur even if no teachers or other school personnel agree to accompany the children on evacuation buses. The Licensing Board noted that Richard Strome, then New Hampshire's Director of Emergency Management, while hoping that teachers viould participate, stated that their participation is not "key to the process" and observed that school children usually get on school buses without assistance and that teachers oo not regularly travel on the buses. See LBP-89-33 at 8. Firially, while the Appeal &Qard was unwilling to accept historical testimony showing that teachers do not abandon school children in emeroencies in support of what

teachers lonormally" are expected to do in an evacuation, we think this testimony at least supports the view that even if riding the bus in an emergency is riot a normal duty, sufficient school personnel will in fact do this if not doing it would endariger the children. 18

Because it nay well be that the Licensing Board has now provided the clarification sought by the Appeal Board, and because the matter does not

17 We address the significance of this issue (and the three other

rermanded issues as well) both in the context of our 'consideration of the gravity of the substantive issue,' 10 C.F.R. / 2.764(f)(2)(1), and in the

context of 10 C.F.R. / 50.47(c).

18 See 28 NRC at 740-41.

appear to be significant in any event, we see no need at this point to "conform" anything in the Licensing Board's SPMC decision to ALAB-924.

2. SPECIAL NEEDS SURVEY

Emergency plaNning includes ensuring that adequate transportation resources and related support services are available to evacuate the transit-dependent population in the EPZ. See 10 C.F.R. / 50.47(b)(8); NUREG-C654, II.J.1C.d. This population includes those with "special needs" for transportation services: homebound physically impaired persons and individuals likely to be without

transportation. In April 1986, the Licensing Board admitted for hearing two contentions sponsored by SAPL which challenged the adequacy of the means usea in the NHRERP for identifying the special reeds population. i9 Subsequently the Licensino Board granted Applicants' motion for partial summary disposition with respect to these contentions insofar as they asserted that adequate procedures for identifying persons with special needs do not exist. See Memorandum and Order of November 4, 1986 (unpublished) at 17.

19 See Memorandum and Order of April 29, 1986 (unpublished). At the

ime SAPL submitted its contentions the NHRERP based the number of individuals without their own automobile transportation on an estimate rather than on a survey by which such individuals would identify themselves. No physically impaired persons had been identified, but the NHRERP assumed one special needs vehicle would be needed for each town. See SAPL's Second Supplemental Petition for Leave to Intervene (February z7, 1986); Applicants' Response to Off-Site EP Contentions (March 5, 1986).

Applicants had moved for summary disposition on the basis of the employment of a new method for determining the special needs

population: a Special Needs Survey conducted by Applicants during the last two weeks of March 1986. 20 In an affidavit attached to their motion, Richard H. Strome, Director of the New Hampshire Civil Defense Agency (NHCCA), described the new method and expressed his opinion that reasonable assurance exists that special needs individuals can and will be identified through utilization of the survey. 21 See Strome Affidavit at 4.

In response to Applicants' motion, SAPL had argued that the survey was inadequate for the purpose of identifying the special needs population, attaching in support of this claim the Affidavit of Frederick H. Anderson, President of Ideas and Information, Inc. and Director of

International Services at International Data Corporation. 22

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20 See Applicants' Motion for Partial Summary Disposition of South Hampton Contention No. 8, NECNP Contention NHLP-4 and SAPL Contentions 18 and 25 (May 20, 1966).

21 Mr. Strome stated. inter alia, that the survey questionnaire was mailed to EPZ residents base on utility customer lists and was distributed by several social service and local municipal agencies; that the questionnaire requested infomation on persons within households who might not be able to comprehend English; that

Civil Defense officials would verify responses; that the survey would be conducted annually; and that public information announcements had been and would be made periodically by the NHCDA "to inform the public of the distribution of the survey, to encourage responses by persons who may require special assistance, and to provide a means for persons to request survey forms if they way not have received them.' Strome Affidavit at 3.

22 See SAPL's Response to Applicants' Motion for Summary Disposition of SAPL-Contentions 5, 7, 14 and 17 and Motion for Partial Surmary Disposition of SAPL Contentions 18 and 25 (June 9, 1986). Mr. Anderson stated, inter alia, that the Strome Affidavit

and survey instrument gave no indication: (1) that special needs individuals who do not receive utility bills, such as those living in apartments or motels, would have been identified; (2) that special needs individuals not resident in the EPZ in March would have been identified; (3) that potential respondents were given sufficient motivation to respond; (4) that the accuracy of information received had been verified; (5) that various design deficiencies had not confused respondents; (6) that those who read only French, Spanish, or other languages or who do not read at all would have responded; (7) that transients in the area would have been reached; and 18) that the single

mailing of the questionnaire would have located even a majority of the special needs population.

SAPL contended on the basis of the Anderson Affidavit that it had raised genuine issues of material fact as to the adequacy of the survey; in particular, that the survey needed to be supplemented using additional identification techniques, that greater motivation to respond needed to be provided, that the survey should be conducted more frequently than annually, that an outreach program to social service agencies needed to be includes, and that the design of the questionnaire needed to be improved-to

eliminate ambiguity. See SAPL's Response at 17-18.

On appeal, SAPL challenged the Licensing Board's grant of summary disposition. The Appeal Board, upon reviewing the filings before the lower board, determined that issues of material fact concerning the adequacy of the survey, which it identified as "issues relating to the methodology utilized to identify the special needs population,-survey design, accuracy verification, response motivation, and update procedures," were indeed present. ALAB-9/-.4 at 16. Moreover, the Appeal Board rejected the only rationale given by the Licensing Board for its decision; i.e., that the "additional requirements" sought by SAPL "would fall into the category of

'extraordinary measures' not required by the regulations of this Commission.' Memorandum and Order, November 4, 1986 at 16-17. 23

Thus the Appeal Board concluded that the Licensing Board had erred in granting Applicants' summary disposition motion and, accordingly, "remand[ed] the matter of the sufficiency of the 1986 Special Needs Survey for further consideration by the Licensing Boaro." ALAB-924 at 19.

Further, the Appeal Board noted that it would be "premature for us to render any judgement regarding intervenor SAPL's challenges to the Licensing Board's findings concerning

availability of adequate numbers of vehicles and drivers" until the Licensing Board had again considered this matter upon remand. 24 Id. at 19-20. The Appeal Board also noted:

> We also are unable in this instance to rely upon the Licensing Board's determination that there is an excess of available evacuation vehicles and drivers, see LBP-88-32, 28 NRC at 695, as the foundation for a finding of h7r-mless error. ... On the present record we have no basis tor setting a limit on the uncertainty about the size of the 'special needs, -population that accrues from the Licensing Board's erroneous sumwary disposition ruling.

23 As the Appedl Board notes, ALAB-924 at 16, the Licensing Board did not address the question of whether genuine issues of material fact were present. Instead, the Licensing Eoara accepted Applicants' argument that the improvements in the survey desired by SAPL constituted 'exrrd0rai-nary measures within the meaning of the Commission's decision in Southern California Edison Co. (San Oriofre Nuclear Generating Station, nits and 3), CLI-8:--10, 17 tl;T r.-28, 536 (196')), rev'd in part on other

grounds, GUARD v. NRC, 753 F.2d 1144 (D.C.Cir. 13W.

24 Before the Licensing Board SAPL raised various challenges to Applicants' testimony that the NHRERP provided reasonable assurance as to the availability of sufficient buses and drivers to effectuate a complete evacuation of the New Hampshire EPZ. See 28 NRC at 692-694. In particular, SAPL claimed that at the hearing Applicants had revised downwards the numbers of buses/drivers that were available. See id. at 694. The Board noted that the State had demonstrated that "it is willing to revise its dependence on certain drivers if the State is made aware of their unavailability" and expected 'that

deficiencies in the driver pool will be provided for through utilization of other resources identified or to be identified by the State." Id. at 693-694. Thus the Board did not believe that any uncertainty created by changes in the pool of buses and drivers assigned to assist in an emergency response undermined its confidence that the NHRERP contained reasonable assurance of sufficient transportation resources. SAPL appealed the Board's resolution of the issue of bus or driver availability. SAPL Brief at 37-39.

In its Supplementary Memorandum the Licensing Board reviewed the remand decision, the original filings with respect to the summary disposition motion, and information subsequently

placed in the record and concluded: (1) that the remanded issues do not present significant safety or regulatory considerations requiring prelicense adjudication; (2) that its finding that adequate transportation and support services would be

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25 At the text of LBP-88-32 cited by the Appeal Board, the Licensing Board considers an Intervenor argument that one particular segment of the special needs population, transients without their own transportation, were not adequately provided with transportation for evacuation. See 28 NRC at 694. Intervenors claimed that the adequacy of

transportation provisions for transit-dependent transients could not be made without having an exact estimate of that population and that there was no such exact estimate because the Special Needs Survey did not identify individuals who may be dropped off by bus or who hitchhiked to the beach, unless they were associated with a hotel responding

to the survey. The Licensing Board noted Applicants' testimony (1) that, based upon the work of KLD Associates (the preparer of the ETE for Seabrook), few transients would require transportation assistance, and (2) that Applicants "had added nine buses to the beach area to address the uncertainties in the number

of individuals in this population and that they had specifically routed buses along the beach area." Id. at 695. The Licensing Board concluded:

> Applicants' allocation of transportation resources in excess of that identified as being needed under its Special Needs Survey also supports a finding that there is reasonable assurance that a small population of transit-dependent transients can be adequately evacuated. ... Based on the number of buses and drivers Applicants identify as being available for evacuation purposes. We also find reasonable assurance that any increase in the estimate of the population of transport-dependent transients can be addressed without

major revisions to the plan.

Id. The Licensing Board's findings are based on record evidence that the number of buses available for evacuation of the special needs population is approximately 50% greater than the number of buses required by the survey. See Applicants' Direct Testimony No. 2 (October 21, 1987), ff. Tr. 4228, at 10.

available to evacuate the transport-dependent population was not undermined; and (3) that the survey deficiencies, even if ultimately found to be meritorious, are either of no moment or are amenable to relatively simple and timely correction. LBP-89-33 at 17.

The Licensing Board's conclusions were premised on the view that "the

focus of SAPL's identified concerns regarding the adequacy of the 1986 Special Survey is to fine-tune and broaden rather than replace the methodology employed by the NHCDA to identify special needs populations." Id. at 21-22. Thus the Board found that SAPL's concerns regarding ambiguities in the design of the questionnaire, the need for motivational language, the frequency of the survey (once a month rather than annually), the need to continuously survey the transient population and the need for testing of the siren system to assist the hearing impaired in determining their need for special notification 26 simply went beyond the requirements of the Commission's emergency planning regulations and associated regulatory guidance. Id. at 18-20. The Board also

noted that SAPL had not "advanced any specific factual bases tending to establish that significant numbers of special needs individuals or their transportation needs were, in fact, understated or unreported." Id. at 18.

The Board did view one issue -- the adequacy of the dissemination methodology employed in conducting the survey -- as having "a reasonable possibility of requiring a prelicense hearing and adjudication." Id. at. 20. However, the Board rejected this conclusion because the NHRERP

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26 See LBP-89-,-)6 (November 28, 1989) which corrects the Board's misimpression, as expressed in LBP-89-33, that this issue was moot.

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contains two features in recognition of the fact that any survey will miss a certain number of people: excess transportation resources27 and a mechanism for special needs individuals who have not been preidentified to make their needs known to energency response workers. Id. at 21. The Board did not believe that the number of unidentified special needs individuals could be "so large as to render the existing excess transportation resources under the NHRERP inadequate."

Commission Conclusion

In reviewing this issue, the Commission finds reasonable the Licensing Board's view that SAPL's concerns with the adequacy of the 1986

Special Needs Survey are primarily in the nature of "fine-tuning" an acceptable methodology-of ascertaining special needs individuals than a contention that the Applicants or the State must begin this task anew due to methodological deficiencies. While the Appeal Board is correct that survey improvements do not amount to "extraordinary measures" within the

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27 The Board found that the fact that the survey had been undertaken in March, before the arrival of the summer population, did not present a significant safety or regulatory issue requiring prelicense adjudication because:

First, any failure to identify summer special needs individuals is of consequence only in the summer, some eight months hence. Second, given the NHRERP's allocation of transportation resources equal to 150 percent of the 1986 identified transit-dependent needs

... and written comitments indicating the overall availability of approximately 170 more buses than the estimated need (LBP-88-32, 28 NRC at 692),

the number of summer transit-dependent individuals would have to be <u>significant</u> before our finding that

> adequate transportation resources will be available can be seriously questioned.

Id. at 19-20.

meaning of the Commission's San Onofre, supra, decision, it is also true that for the most part the improvements desired by SAPL appear not to be required under the Commission's regulations and guidance. Particularly in view of the fact that SAPL, in resisting Applicants' summary disposition motion, did not present any evidence tending to show that any particular special needs individuals were missed (as opposed to expert opinion suggesting that some may have been missed), we believe that the Licensing Board was reasonable in concluding that this remanded issue did

not raise a sicnificant substantive issue regarding emergency planning 28 adecuacy.

However, one aspect of this issue deserves further comment. No survey can guarantee the identification of every transit-dependent individual. In recognition of this, the Licensing Board noted that a common and acceptable approach is to have available both excess transportation resources and a mechanism for special needs individuals who have not been preidentified to make their needs known to emergency response workers. The Licensing Board observed that the emergency plan included both of these measures. LBP-89-33 at 21. On

the basis of our effectiveness review, we agree with the Licensing Board that while some special needs individuals might not be preidentified, that number should not be so large as to render the existing excess transportation resources inadequate. With particular regard for hitchhikers among the peak summer

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28 While the non-moving party, in resisting a summary judgment motion, need not present all the evidence it would introduce at a hearing, it is obliged to support its opposition to summary judgment with evidence that is 'significantly probative". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986).

29 We also note that the survey is to be updated annually, and the next update should be done in the summertime. Thus, the problem highlighted by Intervenors' contention that the prior survey was done in March and therefore missed those who would be present only in the summertime can be easily and expeditiously cured.

beach population, and beachgoers who are dropped off at the beach by family members or others, we rely on the testimony by Applicants' witness which is to the effect that the number of such people is not significant.'29 See Tr. 4252-53 (Oct. 21, 1987). On the basis of this review, we therefore disagree with the Appeal Board that no limit can be set on the uncertainty about the size of the special needs population. We

believe that the uncertainty is not likely so large as to require more transportation resources than the plan already provides.

3. ADVANCED LIFE SUPPORT PATIENTS

The Commission's regulations require the preparation of "an analysis of the time required to evacuate and for taking other protective actions for various sectors and distances within the plume exposure pathway [emergency planning zone] for transient and permanent populations." 10 C.F.R. Part 50, Appendix E, s.lV; see also 10 C.F.R. s.50.47(b)(10), NUREG-0654, Appendix 4. As the Licenslng Board explained:

The primary purpose for having

evacuation time estimates is to assist responsible governmental officials in making informed decisions regarding what protective actions are appropriate in a given radiological emergency in order to maximize dose savings. To make these decisions the government officials must have available to them evacuation time estimates that are realistic appraisals of the minimum period in which, in light of existing local conditiors, evacuation could reasonably be accomplished. The nearer to [the] plant the area that might have to be evacuated, the greater the importance of accurate time estimates. Cincinnati Gas A Electric Co. (William H. Zimmer Nuclear Power Station, Unit 1),

ALAB-727, 17 760. 770, 771 (1983).

The Commission has emphasized that an adequate emergency plan is not required to achieve a preset minimum dose savings or a minimum evacuation time for the EPZ in the event of a serious accident. Long Island Lightin2 Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-13, 24 NRC 22,.30 (1986).

In LBP-88-32, the Licensing Board approved (subject to conditions not relevant here) the evacuation time estimates (ETES) prepared for the Seabrook emergency planning zone (EPZ). 28 NRC at 803. In approving these ETES, the Board rejected the testimony of Intervenor witness Maureen Barrows that the NHRERP had incorrectly estimated the time needed to move a wheel chair nursing home resident from room to

evacuation vehicle 30 on the fol'aowing basis:

> ... Intervenors' assumptions concerning evacuation times for each nursing home patient fail to adequately reflect the evacuation time assumptions of the NHRERP. The plan assumes that patients are at the loading point when transportation arrives (NHRERP, Vol. 6, at 11-[21]), not in their beds awaiting pickup as Intervenors argue.

408 NRC at 699. Although the Licensing Board addressed Ms. Barrows' testimony, it apparently ignored the testimony of Intervenor witness Joan Pilot who voices a similar concern with respect to

advanced life support (ALS) patients. She testified that it would take from 28-60 minutes to move an ALS patient from hospital bed to a stretcher in the same room and that, except for paperwork, it is not possible to begin preparation of an

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30 Ms. Barrows testified that a time trial for moving a wheel chair nursing home resident from her bed to the place where the evacuation bus would be waiting showed a total time of 5 minutes, 17 seconds as opposed to the estimated time of 15 seconds per resident specified in the NHRERP at Vol. 6, p. 11-21. See Direct Testimony of Commissioner

Maureen Barrows, ff. Tr. 4405, at 2-3.

ALS patient for evacuation until the ambulance arrives. See Rebuttal Testimony of Joan Pilot, fol. Tr. 7670, at 1-2; Tr. 7674-76.

The Appeal Board found that appropriate planning implementation had been undertaken with respect to specification of the number and type of transport vehicles assigned to evacuate particular special medical facilities. ALAB-924 at 23. However, the Appeal Board agreed with Intervenors' concern, based on the testimony of Ms. Pilot, see supra, that the preparation time for the evacuation of ALS patients had not been taken into account in the ETEs applicable to this group. Id. at 24-27.

The Appeal Board noted that the Licensing Board's reason for rejecting the Barrows' testimony with respect to nursing home wheel chair residents -- that the NHRERP assumes them to be at the loading point, not in their beds, when evacuation vehicles arrive -- is "inconsistent with the direction given in the individual emergency plans for New Hampshire EPZ towns that patients/residents of special facilities will be assembled as (not before) the evacuation vehicles arrive." Id. at 26 (emphasis in original). The Appeal Board was concerned about a possible underestimate of ETEs for ALS patients stemming from a failure to consider the necessary preparation time due to

the proximity of several special facilities to the Seabrook

plant, as well as the fact that sheltering in large buildings such as these institutions may offer greater protection than that assigned to residential properties, thus making sheltering a more acceptable alternative to evacuation if the evacuation times increase appreciably...Id. at 25 (footnotes omitted). 31.

31 Both the Appeal Board and the Licensing Board appear to haveassumed that ALS patients reside at nursing homes. However, Applicants' witness Michael C. Sinclair testified during cross-examination that Applicants had worked with hospital and.nursing home personnel in developing their

emergency plans as well as the transportation requirements needed to implement those plans and that none of the nursing homes in the EPZ have ALS patients who require ambulance transport. See Tr. 4294-95. Thus the record indicates that all ALS patients reside at Exeter and Portsmouth Hospitals which are located, respectively, seven and eleven miles away from the reactor. NHRERP, Vol. 1 at Table 2.6-3.

Thus the Board remanded this issue for resolution by the Licensing Board. 32

In its supplemental memorandum, the Licensing Board explained that the "loading time" in the ETE for the ambulatory and wheel chair nursing home residents is not the same as the ETE for non-ambulatory persons such as ALS

patients. LBP-89-33 at 25, 28. Only the ETE for the former is based on the notion that the evacuees will be waiting at the loading point for the transit vehicles to arrive. For ALS patients the loading time in the NHRERP is 40.2 minutes which, in the Board's view, "does not deviate in any significant way from an average of the time Ms. Pilot stated it takes to prepare ALS patients for transportation (28 + 60 minutes/2 - 44 minutes)." Id. at 25. Thus the Board found that "[aln increase of four minutes in the ETE would not affect the choice of a protective action recommendation for the ALS patient population as awhole." Id. 33

32 The Appeal Board also noted:

> [c]orrection of the preparation time omission ... also will ensure that special facility planning conforms to the guidance of NUREG-0654 that evacuation time [e]stimates for special facilities shall be made with consideration for the means of mobilization of equipment and manpower to aid in evacuation' and that '[e]ach special facility shall be treated on an individual basis.' NUREG-0654, App. 4 at 4-9 to 4-10.

ALAB-924 at 27, n. 71.

The Licensing Board also found that the adequacy of the ETE for the ALS population for protective action

decisionmaking was further demonstrated by what it perceived to be "an extra margin of time within which ALS patients can be readied for evacuation." Id. at 27. This extra margin of time" is provided by the fact that emergency coordinators contact special facilities at the Alert Classification Level

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33 The Board's explanation does not appear to be based on a closereading of the NHRERP. Evacuation time estimates for transit operations are found at Volume 6, Section 11 of the NHRERP. Section 11 contains ETEs for two different categories of the

population at special facilities such as nursing homes and hospitals: the ambulatory and the non-ambulatory. With respect to ambulatory individuals the NHRERP states:

> Studies have shown that passengers can board a bus at headways of 2-4 seconds .... Thus, if we double these headways to account for elderly or disabled passengers, and allow additional time to walk to the bus, then we estimate that a bus can be fully loaded in about 10 minutes (15 second mean headway for 40 passengers).

NHRERP, Vol. 6 at 11-21. With respect to non-ambulatory persons the NHRERP gives ar estimate of

"0.67 hours" as the time for loading passengers but nowhere explains how this estimate is derived or what activities are encompassed within it. NHRERP, Vol. 6 at 11-26. Thus the Licensing Board's assumption that this "loading passenger' time includes the 'preparation time" of concern to Ms. Pilot is not clearly supported.

Moreover, the Licensing Board also may be in error in grouping the wheel chair residents that were the subject of the Barrows testimony, see LBP-89-33 at 28, with the "ambulatory" group. The NHRERP explicitly places individuals confined to wheel chairs with the non-ambulatory group. NHRERP, Vol. 6 at 11-22. Further, as noted by the Appeal Board, see ALAB-924 at

> 26, n. 69, the directions given in individual emergency plans for nursing homes and hospitals do contain language indicating that patients/residents will be assembled as, and not before, evacuation vehicles.arrive. Thus, while there does not appear to be any reason why ambulatory individuals could not be preassembled, these plans, as presently written, are inconsistent with the NHRERP's provisions for ambulatory individuals.

to verify their transportation needs, a contact which "effectively provides the staffs of the special facilities with advance notice that an evacuation is being considered." Id. 34 we note, however, that the Board does not cite

any medical testimony in support of the notion that preparation of an ALS patient would be medically appropriate at the Alert Level. 35

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34 At the Alert Level emergency response workers contact specialfacilities to confi m their needs and notify ambulance operators of potential need in the event that an evacuation is ordered.

35 In fact this "extra margin of time" rationale ignores, without explanation, Ms. Pilot's testimony that ALS patients cannot be prepared until the ambulances arrive. The

Board further confuses this issue by later suggesting that the NHRERP can be improved "by requiring an amendment to the plan (or town plans) to provide for instructions to the staff of special facilities to prepare ALS patients for transportation at the order to evacuate" (emphasis added). LBP-89-33 at 29. It is unclear what the 'extra margin of time" is if preparation does not begin until the order to evacuate has issued. More fundamentally, the Commission is concerned that preparation of ALS patients for evacuation not begin until it is medically safe to do so.

For the above reasons, the Board does not find any "safety significant

problem outstanding with regard to the transit preparation time for ALS patients." Id. at 28. Moreover, in the view of the Board, "any confusion over the distinction between preparing special-needs persons in anticipation of arriving transportation, and assembling them can be readily resolved." Id. at 29.

Commission Conclusion

On the basis of our effectiveness review, we agree that the issue identified by the Appeal Board -- whether the ETEs for non-ambulatory individuals found in the NHRERP take into account the amount of time it would take to prepare ALS patients for evacuation -- remains unresolved. It is simply not clear that the 40 minute "loading passencer" time found in the NHRERP 36 includes this preparation time

as the Licensing Board asserts. Nor do we necessarily agree, in the absence of any confirmatory medical testimony, that there is any so-called "extra margin of time".

Nevertheless, we still view as reasonable the Board's bottom line conclusion that this remanded issue does not raise a significant substantive issue recarding emergency plan adequacy. The record indicates that ALS 'patients are found at only two locations: Exeter and Portsmouth Hospitals. Thus it should not be difficult to resolve whether the 40 minute period way indeed include adequate time for preparing an ALS patient for transport, taking the patient to the loading point and loading the patient into the ambulance. If these tasks take longer than 40 minutes,

then there will be some "shortfall' in the evacuation time estimate for these patients. We have no reason to believe, however, that this "shortfall" would be significant enough to cause a decisionmaker.to recommend sheltering rather than evacuation for either of these facilities. 37

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36 See NHRERP, Vol. 6 at 11-26.

37 While Intervenors argue that these facilities may not have sufficient staff to prepare ALS patients simultaneously, thus further lengthening necessary preparation tlme, see Intervenors' Supplemental Motion at 49, n. 34,

the NRC Staff points-out that 'at no time during the lengthy litigation of this issue have Intervenors contended that medical facility staffing would be inadequate". NRC Staff Response to Intervenors' Motion to Vacate at 31 (emphasis in original).

We note, as Applicants point out, that even should a significantly enlarged ETE make sheltering a preferable protective action response to evacuation in a given circumstance, this is precisely the action the ALS patients would be taking pending their evacuation. See Applicants' Response at 29. Thus the real issue is whether a greatly increased ETE for ALS patients might make it preferable

for this group to remain sheltered even if evacuation of the general population is called for. In the extraordinarily unlikely event that such a decision needs to be made prior to the Licensing Board's resolution of this issue, we believe that the exceedingly small size of this group would make an "ad hoc" ETE estimate feasible and appropriate.

Again, on a related ETE issue, the Intervenors have argued the need to confom the Board's SPMC decision to what Intervenors interpret as a holding in ALAB-924 that the Commission's emergency planning rules require that emergency plans include ETE's for each special

facility. We do not elevate the Appeal Board's observation about regulatory guidance in NUREG-0654 regarding the calculation of ETEs in a footnote in its opinion to a holding that NRC regulations require that emergency plans include individualized ETEs for special facilities even where only ETE's for the general population are to be used in making protective action decisions. We find reasonable the Licensing Board's extensive discussion of this issue in the SPMC decision at pp. 85-90.

4. IMPLEMENTING DETAILS FOR SHELTERING THE BEACH POPULATION Intervenors argued before the Licensing Board that the NHRERP did not contain adequate provisions for sheltering persons at beach areas near the Seabrook Station. The Board explained that the Commission's emeraency planning

regulations do not require that sheltering be designated as a protective action at each site but rather that a range of protective actions be developed and incorporated into the emergency plan.38 See 28 NRC at 770. Similarly, pertinent regulatory guidance "requires an evaluation of the expected local protection afforded by sheltering, but does not set standards for that protection or require it" (emphasis in original). Id. See NUREG-0654, II.J.10.m. Thus the issue before the Board was whether the State of New Hampshire had given adequate consideration to sheltering as a possible protective action. See 28 NRC at 771.

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38 10 C.F.R. / 50.47(b)(10) provides:

(b) The onsite and ... offsite emergency response plans for nuclear power plant reactors must meet the following standards:

(10) A range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public. Guidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place, and protective actions for the ingestion exposure pathway EPZ appropriate to the locale have been developed.

Although the preferred protective action for the seasonal beach population is almost always early beach closure or evacuation, the State of New Hampshire is prepared to consider sheltering as a possible recommended action in a very limited number of circumstances:

A. When sheltering can be predicted to be the most effective option for achieving maximum dose reduction;

B. When there are physical impediments to evacuation such as fog, snow, hazardous road and bridc-e conditions, and highway construction; and

C. When transients without transportation need sheltering

pending evacuation.

28 NRC at 758-59. 39

39 Implementing detail for use of the shelterina option in the third circumstance -- the need for shelter by the approximately 2% of the beach population without transportation when an evacuation is ordered -- is not at issue. See ALAB-924 at 59. The plan which we are discussing today, and on whice-we are allowing the finding of adequacy to become immediately effective, is the plan as described by the Licensing Board in its NHRERP decision, 28 NRC at 769-772, and as reviewed by the Appeal Board in ALAB-924. Amendments of this plan since the

close of the record before the Licensing Board have not been considered. If changes to the plan are intended, or if the parties believe that the Licensing Board, Appeal Board, or Comission misconstrued the intent of the plan, then appropriate motions should be filed. In light of the foregoing, the Commission denies Intervenors Motion to Supplement Application for a Stay of LBP-89-32, dated February 14, 1990.

In examining the State's consideration of sheltering in these circumstances, the Board found that the likelihood that sheltering would afford the maximum dose reduction was very low because a determination to shelter for

this reason would require the coincidental occurrence of the following circumstances: (1) no earlier action such as precautionary beach closing has been taken; (2) a peak or close-to-peak beach population exists thereby causing evacuation times to be significantly longer than the duration of the predicted release; and (3) the release is predicted to be one of short duration, without particulates, and projected to arrive x.t the beach in a short time. 28 NRC at 759, 775. Further, the Board credited the testimony of Joseph K. Keller, the FEMA representative, who indicated that the uncertainties involved in predicting the start and duration of a release as well as the meteorological conditions which would bring a release to the beach area in a certain amount of time are

considerable and that, in any event, the dose reduction to be expected from shelters available to the beach population is minimal. 40 See 28 NRC at 765-768.

40 Mr. Keller testified that while he could construct scenarios where after the fact it would appear that sheltering would have been a more appropriate response than evacuation, in a real event "[y]ou have very little confidence that you can predict with any reliability what the next step is going to be. So the prudent thing to do is ... to move the people in a 360-decree arc, a radius,

within two or two and a half, three miles." Tr. 14242. The following interchange then ensued:

Q. Well , let me ask you this, if you can't move the people prior to the start of the release because there isn't enough warning,might you then be better because you don't know where the plume isgoing to travel to put them in

shelters, and wait and then evacuatethem in order to avoid this ground shine component to the greatestextent possible?

A. If the State of New Hampshire had come in with a recommendation or an assertion ... that the shelters ... had a shelter factor of .5 or .4, all right. My own personal opinion Is, you might have looked at it a little harder.

> The State came in [and] said, the average shelter factor in this -- of the buildings out here, is about .9 -- a 10 percent reduction. That's not enough -- I mean, when you have uncertainties in source terms and you have uncertainties in weather conditions, you have uncertainties in the nuclide mix that's likely to be there, this 10 percent reduction is so -- is down in the dirt in the error band, it's trivial.

Tr. 14243.

Since the NHRERP contemplates recommending sheltering in the limited circumstances noted above, the Board

considered the shelter available in the area and concluded that enough sheltering exists for the peak or near-peak beach population. See 28 NRC at 770-772, 775. The Board based its finding upon a shelter survey prepared by Stone & Webster for Applicants and provided by them to the State for use as a resourcedocument as well as site visits to the beach area by the Board. 41 28 NRC at 771. The Board did not, however, require that implementing provisions for the sheltering option be included in the NHRERP. The Board explained:

> After reviewing the testimony on the reasons why sheltering is a very low-probability option, particularly Mr. Keller's explanation of the many conditions

that must line up before sheltering can be predicted to save doses, the Board is concerned that forcing implementation into the NHRERP would be a mistake. The greatest risk is that the decisionmaker might implement the sheltering option using preset implementing detail without understanding that the potential benefits are not very great and can readily be outweighed by the uncertainties.

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41 The Board noted that the shelter survey indicates that some three times as much potential shelter space as is necessary is available and that even if Intervenors'

objections to some of this shelter as unsuitable are fully credited only about 20% of the existing shelter potential would be eliminated. 28 NRC at 771-772. The Board rejected Intervenors' contentions that the owners of beach establishments would close their doors to the transient beach population, finding Instead that this population would be regarded as "fellow victims". See 28 NRC at 772. The State found that the survey "identified a large number of shelters that may serve as a pool from which public shelter choices will be made" but declined to incorporate the study into the NHRERP or rely on the study as a planning basis. See Applicants' Direct Testimony No. 6 at 22 and

Appendix 1 at 9.

28 NRC at 769. The Board was content to leave any differences on this point to FEMA and the State of New Hampshire to resolve. 42 The Board corcluded that "the absence of implementing detail for sheltering in the NHRERP is not so material as to foreclose a finding by the Board that the NHRERP provides reasonable assurance that adequate protective measures will be taken in the event of a radiological emergency at Seabrook."

In ALAB-924, the Appeal Board affirmed the Licensing Board's conclusion that the NHRERP appropriately limited sheltering as a

42 The Board was unable to determine what FEMA's view was as to the necessity of additional planning for the sheltering option. See 28 NRC at 769.

protective action option to very limited circumstances. ALAB-924 at 57-58. However, the Appeal Board believed, contrary to the Licensina Board, that implementin-a measures needed to be added to the NHRERP given that sheltering the beach population remained a possible option. See ALAB-924 at 58-69. The Appeal Board held that its finding in the Shoreham proceeding 43 that the probability of implementation of an option was irrelevant in determining whether emergency planning obligations had been satisfied meant that the low probability that sheltering would ever be recommended did not excuse

the lack of implementing detail. The Appeal Board rejected as well the Licensing Board's perception that the addition of implementing detail might cause a decisionmaker to lose sight of the considerable limitations of sheltering even in circumstances where it might be viewed as an option. Rather, in the view of the Appeal Board, the lack of implementing detail essentially left decisionmakers to respeculate [as to] what will be the practical impact of a decision (to shelter]" and, in fact, enhanced "the risk that sheltering will not be utilized in the appropriate, albeit limited, instances contemplated by the plan." ALAB-924 at 64.

The Appeal Board acknowledged that not all implementing details needed to be in place for a plan to be approved

but found that here "the absence of any concerted attempt to incorporate implementing details for protective action options arrived at as a result of the plannina process is a deficiency that must be remedied." ALAB-924 at 68, n.194. The Appeal Board rejected the NRC Staff's contention that the existence of

43 See ALAB-832, 23 NRC 135, 154-57 (1986), aff'd CLI-87-12, 26 NRC 383, 39T-T9 (1987).

the Stone and Webster Survey, inter alia, made planning here "less ad hoc" than the planning at issue in ALAB-832. 44 Rather, said the Appeal Board, "Etjhe planning efforts concerning shelterina already undertaken remain ad hoc until planning officials take appropriate implementing actions (which] [i]n this

case ... would include designating in the NHRERP which shelters on the survey list are suitable and available for use .... to ALAB-924 at 68. Thus the Appeal Board remanded this matter "fcr appropriate corrective action" by the Licensing Board. Id.

Upon remand, the Licensing Board considered again its earlier determination that the lack of implementinc detail in the NHRERP was not so material an issue as to preclude a reasonable assurance finding under 10 C.F.R. / 50.47(a)(1). The Board recognized that further development of the record would likely be necessary to resolve this issue. LBP-39-33 at 31. However, the Board did not believe that the Appeal Board's remand meant that a reasonable assurance finding was now precluded because "the very low

probability of selecting the sheltering option for the beach population and the fact that the beach population does not reach large numbers until July, provides adequate safety pending the resolution of the remanded sheltering issue." Id. at 33. The Board further observed that "[i]mplementing measures may not be difficult to effect," noting that "sheltering available for the outdoors transient beach population is concentrated in a relatively compact and well defined area." Id. at 32.

44 The Staff pointed out to the Appeal Board that, " ... for the sheltering option under the NHRERP, the means of public notification exist; the mechanisms for a protective action

detemination are in place; and the size of the beach population and the quantity, quality, and location of the shelter are known." ALAB-924 at 62-63.

Commission Conclusion

On the basis of our effectiveness review, we agree with the Appeal Boara that so lonc as sheltering remains a potential, albeit unlikely, emergency response option for the beach population, the NHRERP should contain directions as to how this choice is to be practicably carried out. Such directions should include identification of the location of sufficient available shelter together vtith the means to notify the beach population as to where this shelter is located. Given the existence of the Stone & Webster Survey,

we do not believe incorporation of implementing detail into the NHRERP to be especially difficult or

time-consuming. 45

However, we also find reasonable the Licensing Board's decision that this remanded issue does not raise a sionificant substantive issue regarding emergency planning adequacy. The record shows clearly that evacuation rather than sheltering is the principal protective action for the beach population, and that the average shelter factor is so small . that the public protection afforded from sheltering is very small. FEMA characterized the dose reduction from sheltering as "trivial" and "down in the dirt in the error band", supra p.39, n.40. We note in this reaaed that the emergency plan for the

Massachusetts beaches, which the

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45 In this connection, we note that the Licensing Board has interpreted the remanded issue to mean that specific sheltering (as compared to maps showing sheltering areas) be Identified for the general beach population. See LBP-89-33 at 31-32. We understand the Appeal Board's direction to-7esignate in the NHRERP "which shelters on the survey list are suitable and available for use," ALAB-924 at 68, as meenina that there should be a sufficient quantity of available shelter space rather than that there must necessarily be agreements with particular establishment owners to

provide space to beachgoers.

Licensing Board found to be adequate, does not even include sheltering as an option. Given these considerations, we believe that the absence of implementing detail for the sheltering option is not sionificant.

B. Remaining Unreviewed Contested Matters

1. Licensing Board Decision LBP-89-32 Deciding Contentions or the Emergency Plan for Massachusetts and the Full Participation Exercise

The final significant segment of Seabrook operating license litication

entertained issues on the adequacy of the Seabrook Plan for Massachusetts Communities (SPMC) and the full participation exercise of that plan along with the exercise for the NHRERP and Applicant's plan for onsite response capability as well as the State of Maine's ingestion pathway plan. See 10 C.F.R Part 50, Appendix E I IV(I). The Licensing Board order in LBP-89-32, resolved the issues that were admitted for litigation 46 an(i decided that the SPMC is adequate and implementable.

The Board ruled that the June, 1988 exercise was adequate in scope and revealed no fundamental flaw in any of the plans exercised. The Board specifically found that the SPMC meets the Commission's emergency planning regulatlons. See 10 C.F.R. / 50.47(a) and Appendix E to 10 C.F.R. Part 50.

Thus the Board found, subject to certain commitments, conditions and the like for which the Director of NRR is charged with

> 46 One hundred twenty-three contentions were admitted for litigation.As later consolidated, there were 63 contentions admitted with respect to the SPMC and 21 with respect to the plan exercise. LBP-89-32 at 3.

verifying conformance, that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiolocical emergency at the Seabrook station. 47

In the same opinion the Board also resolved the one remaining ETE-related (Evacuation Time Estimate) issue over

which it retained jurisdiction from the New Hampshire phase of the proceedings. Slip op. at 36. In a separate opinion, LBP-89-17, 29 NRC 519 (1989), another Seabrook Licensino Board had earlier decided in June 1989, that Applicants' Vehicular Alert Notification System (VANS) provided adequate means to alert people who are within the Massachusetts portion of the emercency planning zone of an emergency situation.

> LBP-89-32 is on appeal before the Appeal Board on issues related to48 both the SPMC and the 1988 exercise The Appeal Board is considering.

Intervenors' Appeal of LBP-89-17 (VANS decision) along with LBP-89-32 because the VANS decision was simply one step on the way to LBP-89-32's conclusive

finding of adequacy of emergency planning for the Massachusetts portion of the EPZ. As the only unreviewed partial initial decisions resolving admitted contentions relevant to the issuance of a

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47 FEMA had reviewed the SPMC and judged the exercise and on both testified in the proceeding that they met the NRC regulations and standards. In other words, both the SPMC and the exercise provided reasonable assurance that adequate protection would be provided in the event of a radiological emergency. FEMA's conclusions are presumed to

be correct unless rebutted. 10 C.F.R. s.50.47.

48 This is apart from objection taken to the Licensing Board's treatment in that order of the impact of the Appeal Board's remand in ALAB-924 on the authorization of issuance of a license. full power license, these decisions are a central focus of our immediate effectiveness review.

In considering the conclusions of LBP-89-32, the Commission has paid particular attention to issues raised by Intervenors in their imediate effectiveness review comments. 50 The Commission has neither been shown nor found sua sponte that it need withhold effectiveness of operation of Seabrook

pendina administrative review. Our review has, however, turned up several matters on which we believe we can provide some helpful comment or for which, as a matter of policy, we require some further commitment or action bv the Applicants or Staff. In some instances the Corrinission does so not because it is clearly essential to safety, but because additional enhancements to the adequate emergency preparations that have already been made appear desirable on the basis of our effectiveness review. We discuss these matters below.

(i) Evacuation Time Estimate (ETE) Issues

In LBP-89-32, the Board made the finding that the number of ETES. generated, and the regions and scenarios for which they were generated,

49 As noted elsewhere, LBP-88-32 has been substantially reviewed by the Appeal Board. Petitions for review of the Appeal Board's decision, ALAB-924, are pending. LBP-89-33, the Licensing Board's explanation of its authorization of a license following
ALAB-924, was considered in the preceding section as a supplemental partial Initial decision.

50 MassAG's immediate effectiveness comments on the Licensing Board decision on the SPMC and exercise alone included 34 separately asterisked discussions of error spread over 33 pages. The total lack of references to the

> record which might aid our understanding of their belief that the Licensing Board erred in the referenced portions of the decision was not helpful. Nonetheless because of the importance of this matter we have had our adjudicatory staff do as much of the tracking of sources as possible. The parties are on notice that they may not further rely on the Commission to do their work for them and cannot-Fe heard to complain of any incompleteness in the Commission's response.

are sufficient and correct'Y limited in number so as to be usable by a decisionmaker fairly quickly and not to be overly cumbersome. LBP-89-32 at 47. However, Intervenors complain that the

Board permitted a reatonal approach to producing ETEs and assert that separate ETEs should be created for Massachusetts decisionmakers. LBP-89-32 also states that the liassachusetts Attorney General argued for segregated ETEs for the Massachusetts and New Hampshire portions of the EPZ. Id. at 44.

Our regulation at 10 C.F.R. / 50.47(b)(10) requires, in part, that licuidelines for the choice of protective actions during an emergency, consistent with Federal ouidance, are developed and in place." Criterion ILI.J.10.1 of NUREG 0654 indicates that an organization's plans to implement protective measures for the plume exposure pathway EPZ shall include "...time estimates for evacuation of various sectors and distances based on a dynamic analysis (time-motion study

under various conditions) for that EPZ." Criterion II.J.10.1 also references Appendix 4 cf NUREG 0654 as the location for more detailed guidance on performing such an ETE study. Appendix 4, in turn, includes the following criteria for cetermining sub-areas within the EPZ for which ETEs are required. The sub-areas must encompass the entire plume exposure pathway EPZ, as ETEs are required for the situation of the simultaneous evacuation of the entire EPZ. The sub-areas to be considered are also to be radial distances of about 2, 5, and 10 miles from the nuclear plant, with the areas within these circles to be divided into four, 90 degree sectors. The boundaries of these sub-areas should be based on demography, topography, land characteristics, access routes, and local jurisdictions, and should not

divide densely populated areas to the extent practical.

The guidance in Appendix 4 of NUREG 0654 neither requires nor suggests that the sub-areas' boundaries must take into account the borders of contiguous States. Therefore, the Board's conclusion that there is no regulatory requirement for segregated ETEs for Massachusetts and New Hampshire appears to be correct. Moreover, as a practical matter, we agree in this effectiveness review with the Board's position in LBP-89-32, that the recional approach of the ETEs is acceptable, given the reality that traffic flow cannot be segregated temporally according to political boundaries and because there is no suggestion that evacuees from New Hampshire portions of the EPZ would be

prohibited from entering the Commonwealth.

Furthermore, the guidance of NUREG 0654 states that, when making ETEs for outer sectors, it is to be assumed that the inner, adjacent sectors are being evacuated simultaneously. In LBP-89-32, the Board concluded that the Applicants' regional approach in presenting ETEs was acceptable given that the New Hampshire coastal areas are closer to the Seabrook Station than are the Massachusetts communities and will be generating sizeable traffic flows before or as soon as an order to evacuate is issued in Massachusetts. Indeed, one might conclude from the NUREG 0654 guidance and the aforementioned conclusion by the Board, that the Massachusetts ETEs would be unacceptable under the regulatory guidance, if they dld not take into

account permitted traffic flow from New Hampshire portions of the EPZ that were nearer to the Seabrook Station.

In LBP-89-32, the Board indicates that the NRC Staff witness concluded that the Applicants' ETE study satisfied the guidance of Appendix 4 of NUREG 0654 and all applicable regulatory requirements with

one exception, which was categorized as essentially an editorial task. This exceptior was that the ETE study should be published. LBP-89-32 states that the Applicants committed to publish the ETE

study. The Board required that the published study be submitted to the NRC staff for verification within 60 days of the date of service of LBP-89-32. LBP-89-32 at 115-16. The Board's instruction to publish the study and to submit it to the Staff, so that verification of the publication commitment can take place, was appropriate, as there is no regulatory requirement to incorporate the entire study in an emergency plan.

The Commission finds the Board's decision on this issue reasonable since the guidance contemplates that for ETE purposes the EPZ would be divided in a series of concentric radials, with the areas within the circles into quadrants, taking into account various geographic and demographic features. As a practical matter, where more than one

state is involved, decisionmaking is coordinated and may be expected to be so here particularly since the utility plan for the SPMC contemplates a cooperative effort.

Nonetheless, should the Commonwealth of Massachusetts decide to participate in planning and wish separate ETEs in order to prepare a state-sponsored emergency plan or for its own use in arriving at protective action decisions, the Commission sees no reason why ETE's cannot be promptly developed and considered for that use.

(ii) Notification of Special Facilities in an Emergency The Commission believes that the Board reasonably decided Intervenors' concerns with regard to communication with schools or special needs persons. The Commission notes only that the Applicants, among other

things, committed to supplying tone alert radios to Massachusetts EPZ schools as another means to assure timely notification of the school population in the event of an emergency. No time for fulfillment of the commitment is provided.

51/ See id. at 243.

The Commission believes that this additional protection for school children should be accomplished promptly and without unnecessary delay. However, we do not believe that the matter is significant such that it must be accomplished prior to issuance of the full power license.

(iii) The Sheltering Option for the Beach Population in Massachusetts

Our separate opinion today deciding the certified question is relevant to

Intervenors' arguments with regard to an alleged inadequacy in the range of options for the beach population. That opinion confirms that the adequacy of any emergency plan is not to be judged with specific reference to some minimum level of dose savings. A plan is to be judged under the Commission planning standards, which resulted from a comprehensive public rulemaking which included consideration of the ways to assure effective emergency responses to radiolocical incidents. The Board's finding that the SPMC contains a range of possible protective options for people in the Massachusetts'portion of the EPZ

52/ Id. at 221.

even though not every option is necessarily available everywhere appears reasonable.

(iv) Congregate Care Facilities

LBP-89-32 describes the SPMC's provisions for Congregate Care Centers for school children and for mobility-impaired persons who do not require hospital care. The Holy Cross College in Worcester will serve as a Host School Center for all the Massachusetts EPZ's public, private, daycare, and nursery school children. The primary Host Ambulatory Special Needs Center would be located at the Shriners' Auditorium in Wilmington, while a backup Concregate Care Center for excess members of the ambulatory special needs population would be located at a large facility known as the Westborough facility.

53/ It is alternatively spelled "Westboro" in LBP-32, passim, and in other documents.

Section 10 CFR § 50.47(b)(8) requires that "adequate emergency facilities and equipment to support the emergency response are provided and maintained." 10 CFR 50.47(b)(10) states, in part, "that a range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public." Criterion II.H.4 of Supplement I to NUREG 0654 states as guidance for meeting the regulatory criteria that "each offsite response organization shall provide for timely staffing of the facilities and centers described in the offsite plan." Criterion II.J.10.d of Supplement I states that "the offsite organization's plans to implement protective measures for the plume exposure pathway shall include the means of protecting those persons whose mobility may be impaired

due to such factors as institutional or other confinement. These means shall include notification, support, and assistance in implementing protective measures where appropriate."

a. Adequacy of the Westborough Facility

The Board found that the Shriners' Auditorium can accommodate roughly half of the Massachusetts special needs population who are not school children.

54/ LBP-89-32 at 338.

The Westborough facility is to be available as a backup to accomodate the over 1000 special needs persons who cannot fit into the Shriners' Auditorium in the event that the protective action chosen requires that the entire special needs population be accommodated. The Board noted that FEMA evaluated the Westborough facility for the general

population who would evacuate the EPZ, but not as a facility suitable for the needs of mobility-impaired evacuees. Id. at n.52.

LBP-89-32 indicates that, with the exception of the Westborough facility as a Congregate Care Center for mobility-impaired persons, FEMA found all of the Congregate Care Centers in the SPMC to be adequate. Since the Westborough facility is described in LBP-89-32 as a backup Congregate Care Center for excess numbers of mobility-impaired evacuees, the Commission believes that evaluation of its adequacy for this purpose would be beneficial. Accordingly, the Director of the Office of Nuclear Reactor Regulation, in consultation with FEMA as appropriate, should evaluate the Westborough facility's adequacy as a

Congregate Care Center for mobility-impaired persons. However, we do not believe that the matter is significant such that it must be accomplished prior to issuance of a full power license.

(b) School officials' roles during Evacuation and early stages of Congregate Care

LBP-89-32 finds that the Host School Center at Holy Cross College would accommodate the Massachusetts EPZ's school children if they are evacuated from their schools. The Board further states its understanding that the SPMC incorporates an "evacuation in place" concept

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55/ Id. at 314.

whereby it is assumed that teachers, day care workers, and nursery school personnel will continue in their

"service provider roles" while accompanying their charges through an evacuation process and into the early stages of congregate care. Furthermore, facility administrators and supervisors are assumed by the SPMC to continue to exercise their pre-emergency authority, including calling for additional staff and assigning persons under their pre-emergency authority in a manner that best serves the needs of their group of evacuees. In LBP-89-32, the Board rejected the MassAG's argument, similar to that advanced with respect to the NHRERP, that there is no "reasonable assurance" that Commonwealth school officials will continue in their pre-emergency roles in the event of an actual radiological emergency. As we indicated earlier in this opinion, we consider it reasonable to conclude that

school children can be evacuated without teachers on the buses.

Relatedly, in LBP-89-32 the Board states that the Applicants will make SPMC orientation training available, during some unspecified time period, to Massachusetts school officials regarding the roles that the SPMC expects them to-fulfill in a radiological emergency. The Director of the Office of Nuclear Reactor Regulation should ensure that the Applicants offer this orientation training to all appropriate Massachusetts EPZ school officials and that the training be made available so that it could be completed by the end of the 1989-1990 school session.

3. The Motions to Reopen

In three separate opinions, one issued before and two after LBP 89-32 and 89-33, the Licensing Board rejected

three categories of contentions: LBP 89-28 (ruling on low power testing contention), October 12, 1989; LBP 89-38 (ruling on motions regarding onsite exercise) December 11, 1989, and LBP-90-1 (Ruling on Intervenors' Motions to Admit a Late Filed Contention and Reopen the Record Based Upon the withdrawal of the Massachusetts E.B.S. Network and WCGY) January 8, 1990. We discuss them briefly in turn.

The low-power testing contentions

The Licensing Board declined to reopen the hearing to admit the low power contentions in which Intervenors wished to explore a new operator qualifications based on operator misjudgment during low-power testing. Key to its decision was the determination that low-power testing is not material to the grant of a

full power license and therefore is not automatically subject to litigation as Intervenors maintain. The Licensing Board is clearly correct in that full power licenses may issue without a previous issuance of a low power license which would be otherwise needed to permit such testing. Indeed, were each phase of pre-full power-operational readiness testing to open the door to relitigating the licensing issues it is doubtful that any plant would avail itself of the benefits of an early low-power testing license. Perhaps more importantly, the record shows that Intervenors' contentions are based on staff reports and that this is a matter to which staff has paid considerable attention.

56/ A civil penalty has been assessed against the Applicants request for an exemption from conducting a test of the

onsite plan within a year of issuance of a full power license CLI-89-19, 30 NRC 171 (1989).

The Board specifically noted that it had before it an "ample factual record" (LBP-89-28 at 41) from the affidavits provided by the parties to make a determination on whether the issues were safety significant and explained why they were not. The Commnission believes that the Board's conclusions are reasonable.

The September 18, 1989 Onsite Exercise Contentions

An exercise of Applicants' onsite plan was held on September 18, 1989.

57/ The exercise followed the Commission's denial of the Applicants' request for an exemption from conducting a test of the onsite plan within a year of issuance of a full power license. CLI-89-19, 30 NRC 171 (1989).

Intervenors thereafter contended that the scope of the onsite exercise was insufficient to fully test the onsite

plan. The Board rejected the contentions based in part on Intervenors failure to meet reopenine standards but also, and more importantly, because of a failure to plead how the alleged insufficient scope resulted in a situation where a fundamental flaw in the emergency plan could avoid detection. Significantly, the Board also found that the regulations which Intervenors claimed set the standard for the scope of the exercise were applicable to the full participation exercise but not to the exercise solely of the Applicants' onsite plan. LBP-89-38 at 41. We do not here summarize the Board's 41-page opinion, but express our view that the Board's treatment of this matter appears reasonable. Applicants, onsite plan had been tested on several occasions before

this one and no fundamental flaw was shown. Given the prior review and exercises of the onsite plan, it strikes us as unlikely that a fundamental flaw would have arisen, although it is possible that there might be a lapse in readiness. To avoid such readiness lapses is the principal goal in requiring an annual exercise. We also note that the scope of the exercise does not appear to be inconsistent with the scope of onsite exercises at other plants.

The EBS Contentions

In its decision, LBP 90-1, the Licensing Board rejected contentions related to broadcast notification included in Intervenors' motions served on November 3 or 9

58/ We need not here address the confusion that apparently resulted from

MassAG's withdrawal and resubmittal of his motion to admit the EBS contention.

and November 22. The motions were filed late in the process - at the most a few days before the SPMC decision - and raise the issue whether a motion of this sort can be so late that its consideration is simply precluded. We do not address this issue here; we will consider, separate from the Seabrook proceeding, the desirability of additional guidance regarding such late filed motions. In any event, our effectiveness review here suggests that in the circumstances the Board's application of the reopening standards to these motions was reasonable.

C. Uncontested Issues, Verification cf Conditions and Plant Readness

1. Uncontested Issues and Verification of Conditions

As with any full power license, a full

power license for Seabrook will necessarily contain numerous technical conditions which reflect the Staff's prelicensing technical review of issues relevant to full power operation.

As a result of the litigation of contested issues numerous conditions were placed on license issuance. The Director of Nuclear Reactor Regulation shall ensure that the license includes all of the necessary corditions and that those that are prelicensing conditions have been met. The requirements of this effectiveness order shall not be conditions in the license, as they represent requirements subject to change in the adjudicatory process. Nonetheless, interim compliance is necessary as stated and shall be confirmed by the Staff.

2. Plant Readiness

On January 18, 1990 the Commission met in public session to receive briefings from the Applicants and the Staff on the readiness of the Seabrook plant to receive a full power license. Both reported that the plant was ready except for certain specified exceptions, and the Commission also requested some additional information. The Commission has on January 23, February 9, February 26, February 28, and March 1, 1990 received notice from the Staff that those exceptions have been or are being resolved on the anticipated schedule, and that the plant is ready to begin ascension to full power operation. In particular, the Staff completed detailed reviews of late-filed allegations including approximately 255 separate allegations prepared by the Duality

Technology Corporation for the Employees Legal Project as well as 13 allegations of a private citizen who taped Seabrook control room radio transmissions between January 1989 and the end of January, 1990. Based on these reviews, the NRC Staff concluded that none of the allegations represents concerns that are material to the issuance of a full-power license. Moreover, the review detemined that the majority of the concerns were restatements of allegation's previously submitted and resolved.

In light of the foregoing considerations, the Commission's effectiveness review fully supports allowing the Licensing Board's authorization of issuance of a full power license to become effective.

IV. The Stay Motions

The Commission's effectiveness review under § 2.764 is designed to enable the Commission itself to examine preliminarily the matters decided by the Licensine Board in order to determine whether the decision can become effective and thus authorize issuance of a full power license. While parties were invited by our rules to file effectiveness coments, the principal avenue for relief for parties seeking to preclude license issuance pending appeals is to seek a stay under § 2.788. Stays are a part of the formal adjudicatory proceeding, and the criteria for consideration of a stay under § 2.788 of the Commission's regulations are the same as those which the courts apply in granting or denying a stay pending appeal.

59/ Section Section 2.788 establishes the following factors to be considered in reviewing a request for a stay:
(1) whether the moving party has made a strong showing that it is likely to prevail on the merits;
(2) whether the party will be irreparably injured unless a stay is granted;
(3) whether the granting of a stay would haem other parties; and (4) where the public interest lies.

60/ New England Coalition on Nuclear Pollution filed a separate stay request on the same day. The Commission has considered it as well, along with stay requests included with a party's immediate effectiveness comments.

Administrative Due Process

Intervenors claim that there has not been administrative regularity in the conduct of this proceeding. Intervenors particularly do not like and vigorously object to the Commission's procedures permitting licensing boards to evaluate whether a remand need block authorization of a license, requiring all contentions after the original stage

to be subject to certain "timeliness" requirements, and allowing the Commission to step into a proceedine at any stage to offer guidance to the parties.

The procedures to which Intervenors object are neither unprecedented nor aberrations; they have been in force for years and have been applied to numerous nuclear power plant licensing proceedings before this one.

61/ See discussion supra at sections II.B.1 and 2 and citations there provided.

Their application to this proceeding is not a deprivation of due process.

2. Financial and Resource Harm

Intervenors claim that they will be harmed from the irretrievable commitment of resources associated with operation pending appeal and the alleged inability of the Applicants to meet the expenses

of decommissioning in the event that they operate at full power and the license is later vacated upon final order of the Commission (or a court) after review.

There is no support for Intervenors' claim that the commitment of resources will cause a bias in favor of continuing the license in subsequent Commission decisionmaking.

62/ Intervenors citation to NEPA cases for the proposition that the commitment of resources will prevent meaningful review is unavailing. The decisionmaking process under NEPA includes consideration of commitments of resources and economic factors, while the decisionmaking process for compliance with NRC emergency planning regulations does not.

To the contrary, as the Intervenors themselves have recognized, the Commission has stated repeatedly and catecorically that it will not consider the commitment of resources to a

completed plant or other economic factors in its decisionmaking on compliance with emereency planning safety regulations. See e.g., SAPL v. NRC, 690 F.2d 1025 (D.C. Cir. 1985).

Intervenors' further assertion that Applicants' financial condition will leave them unable to meet decommissioning expenses in the event a license is ultimately vacated totally lacks substance. They claim that the Applicants would have no more than $43 million available at the end of the first year frorr. the state funding source for decommissioning and could have nothing from NRC funding. Intervenors are mistaken. The Applicants' surety bond for $72,126,456.00, required by the Commission for issuance of a low-power license, is effective until "the earlier

of (i) a final non-appealable regulatory or judicial determination that the Seabrook Project has been granted a license...other than as contemplated by the issuarce of the license for low power testing ... or (ii) a final non-appealable regulatory or judicial detemination that no further Pre-Operational Decomissioning is required." Surety Bond between Applicants and The Aetna Casualty and Surety Company as Surety, dated March 20, 1989. Thus this bond is available during the pendency of appeals which could lead to vacation of the license. And, lest there be any doubts on this score, we merely require that the bond, or a similar one, be available pending appeals. Addind the available state funds to the $72.1 million available from the surety, it is evident that

Applicants here would have available over $115 million in the event that premature decommissioning were required. This large sum is close to what, under the Commission's decommissioning rules, would be required for decommissioning of a plant which had been in operation for a long period of time. We find that fund sufficient to offset any claim of irreparable injury from lack of decommissioning funds.

63/ Intervenors use a figure of $242 million developed by the Applicants' in another context,as the "total decommissioning cost assumption." Intervenors' Stay Motion at 9. The Commission does not recognize that sum. We assume that it includes decomissioning costs other than those necessary to avoid radiological harm which are not cognizable here.

In fact Applicants here have done far more to meet decommissioning expenses than our rules literally require.

3. Increased Risk of Nuclear Accident by Alleged Lack of Competence of Seabrook Operators

It is well settled that speculation about occurrence of a nuclear accident does not constitute the kind of irreparable injury that would warrant a stay of full power operations. Eg., Cleveland Electric Illuminating Co. et. al. (Perry Nuclear Power Plant, Units I and 2), ALAB-820, 22 NRC 743, 748 n.20 (1985) citing New York v. NRC, 550 F.2d 745, 750-757 (2d Cir. 1977) and Virginia Sunshine Alliance v. Hendrie, 477 F. Supp. 68, 70 (D.D.C. 1979). In an apparent effort to distinguish this settled principle, Intervenors argue that a June 22, 1989 event during low-power testing, when Seabrook plant personnel erred in not tripping the reactor at the point first called for by the low-power testing procedure,

indicates inadequate training, operating procedures and performance, and that this in turn increases the risk of an accident. We find this argument unpersuasive. The error during low-power testing was significant, and led to enforcement and corrective actions. But the Board, after an exhaustive examination of the incident, based on affidavits from the parties and the extensive NRC Staff investigations of the event, found that reactor plant safety was never in question, that with this one exception plant staff performed well, that there was no evidence of willful noncompliance with NRC requirements or withholding of information from NRC, and that the event reflected only an isolated instance of a failure to adhere strictly to applicable procedures and did not represent a

pervasive breakdown or fundamental flaw in Applicants' testing or training programs. LBP-89-28 at pp 20-22, 28-43. We find the Board's careful discussion and evaluation of the safety significance of this event entirely reasonable and, based upon this and on Staff's and Applicants' own follow-on corrective actions, fail to see how the event evidences any increased risk of accident at Seabrook. In fact we think that Intervenors' own affiants demonstrated that the Commission is holding the public safety in high regard.

64/ The affiants noted that the NRC staff planned to evaluate the proficiency of all Seabrook shift crews under simulated accident conditions in mid-December 1989. Joint affidavit of Gregory C. Minor and Steven C. Sholly at 6.

B. The Remaining Factors

Given the lack of any showing of irreparable harm to Intervenors, a

strong showing. would need to be made on the remaining stay factors in order for any stay to be granted. Our discussion of the litigated issues in our immediate effectiveness section is fully applicable here. That discussion indicates that Intervenors have certainly not made a strong showing that they are likely to prevail on the merits of further appeals. We offer no comment at this point on how a stay could harm Applicants' interests or affect the reliability of electrical power in the New England area - matters which, if considered, could not bolster Intervenors' case in any event. However, we do believe strongly that a stay at this point would be contrary to the public interest which underlies the mandate to us in 5 U.S.C. §558 to complete license application proceedings

within a reasonable time with due regard for the richts of the parties.

Conclusion

For the reasons explained above, the Director of NRR may issue the license authorized by the Licensing Board in LBP-89-32 on a schedule consistent with the following provisions for a housekeeping stay. Given the controversy which has surrounded the Seabrook plant since these proceedings commenced, we fully expect that judicial review of this decision will be sought. As a courtesy to the parties to pemit the filing of judicial stay motions, the effective date of this decision will be March 8, 1990. If motions for a stay are filed by plant opponents with the U.S. Court of Appeals within this

period, then the decisions effective date will be one week after the relevant motions are filed.

It is so ORDERED.

Dated at Rockville, Maryland
this 1st day of March, 1990

For the Commission

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66 Commissioners Curtiss and Remick abstained from consideration of this matter.

The Applicants and the NRC staff thereafter, on December 8 and 17 respectively, filed their responses in opposition to the grant of the stay.

A. The Irreparable Injury Factor

Of the four stay factors, it is well established that "the most crucial [factor] is whether irreparable injury will be incurred by the movant absent a

stay." Alabama Power Company (Joseph M. Farley Nuclear Plant Units 1 and 2), CLI-81-927, 14 NRC 795, 797 (1981). For that reason we turn first to Intervenors' claims of harm to them. The claims appear to boil down to three categories of harm: 1) an alleged due process harm, focusing on a claim that they are harmed by being forced to seek a stay of license issuance even after a victory before the Appeal Board; (2) an alleged cost and resource harm (3) an alleged harm from increased risks during operations by allegedly untrained operators.

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10 C.F.R. § 50.47 Emergency Plans.

(a)(1) Except as provided in paragraph (d) of this section, no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

(2) The NRC will base its findings on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented. A FEMA finding will be primarily based on a review of the plans. Any other information already available to FEMA

may be considered in assessing whether there is reasonable assurance that the plans can be implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability.

(b) The onsite and, except as provided in paragraph (d) of this section, offsite emergency response plans for nuclear power reactors must meet the following standards:

(1) Primary responsibilities for emergency response by the nuclear facility licensee and by State and local organizations within the Emergency Planning Zones have been assigned, the emergency responsibilities of the various supporting organizations have been specifically established, and each

principle response organization has staff to respond and to augment its initial response on a continuous basis.

(2) On-shift facility licensee responsibilities for emergency response are unambiguously defined, adequate staffing to provide initial facility accident response in key functional areas is maintained at all times, timely augmentation of response capabilities is available and the interfaces among various onsite response activities and offsite support and response activities are specified.

(3) Arrangements for requesting and effectively using assistance resources have been made, arrangements to accommodate State and local staff at the licensee's near-site Emergency Operations Facility have been made, and

other organizations capable of augmenting the planned response have been identified.

(4) A standard emergency classification and action level scheme, the bases of which include facility system and effluent paramenters, is in use by the nuclear facility licensee, and State and local response plans call for reliance on information provided by facility licensees for determinations of minimum initial offsite response measures.

(5) Procedures have been established for notification, by the licensee, of State and local response organizations and for notification, of emergency personnel by all organizations; the content of initial and follow up messages to response organizations and

the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

(6) Provisions exist for prompt communications among principal response organizations to emergency personnel and to the public.

(7) Information is made available to the public on a periodic basis on how they will be notified and what their initial actions should be in an emergency (e.g. listening to a local broadcast station and remaining indoors), the principal points of contact with the news media for dissemination of information during an emergency (including the physical location or locations) are established

in advance, and procedures for coordinated dissemination of information to the public are established.

(8) Adequate emergency facilities and equipment to support the emergency response are provided and maintained.

(9) Adequate methods, systems and equipment for assessing and monitoring actual or potential offsite consequences of a radiological emergency condition are in use.

(10) A range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public. Guidelines for the choice of protective actions during an emergency, consistent with Federal guidance are developed and in place, and protective actions for the ingestion

exposure pathway EPZ appropriate to the locale have been developed.

(11) Means for controlling radiological exposures, in an emergency, are established for emergency workers. The means of controlling radiological exposures shall include exposure guidelines consistent with EPA Emergency Worker and Lifesaving Activity Protective Action Guides.

(12) Arrangements are made for medical services for contaminated injured individuals.

(13) General plans for recovery and reentry are developed.

(14) Periodic exercises are (will be) conducted to evaluate major portions of emergency response capabilities, periodic drills are (will be) conducted to develop and maintain key skills, and

deficiencies identified as a result of exercises or drills are (will be) corrected.

(15) Radiological emergency response training is provided to those who may be called on to assist in an emergency.

(16) Responsibilities for plan development and review and for distribution of emergency plans are established and planners are properly trained.

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PUBLIC LAW 96-295 [S.562]; June 30, 1980

AUTHORIZATION, APPROPRIATIONS -NUCLEAR REGULATORY COMMISSION

For Legislative History of this and other Laws, see Table 1, Public Laws and Legislative History, at end of final volume.

An Act to authorize appropriations to the Nuclear Regulatory Commission in accordance with section 261 of the Atomic Energy Act of 1954, as amended, and section 305 of the Energy Reorganization Act of 1974, as amended, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE 1-AUTHORIZATION OF APPROPRIATIONS FOR FISCAL YEAR 1980

Sec. 101.(a) There is hereby authorized to be appropriated to the Nuclear Regulatory Commission in accordance with the provisions of section 261 of the Atomic Energy Act of 1954 (42 U.S.C. 2017) and section 305 of the Energy Reorganization Act of 1974 (42 U.S.C. 5875), for the fiscal year 1980, the sum of $426,821,000, to remain available until expended. Of such total amount authorized to be appropriated:

(1) not more than $66,510,000, may be used for "Nuclear Reactor Regulation", of which an amount not to exceed $1,000,000 is authorized to accelerate the effort in gas-cooled thermal reactor preapplication review;

(2) not more than $42,440,000, may be used for "Inspection and Enforcement"; of the total amount appropriated for this purpose, $4,648,000 shall be available for support for 146 additional inspectors for the Resident Inspector program;

(3) not more than $15,953,000, may be used for "Standards Development";

(4) not more than $32,380,000, may be used for "Nuclear Material Safety and Safeguards"; of the total amount appropriated for this purpose -

(A) not less than $60,000 shall be available only for the employment by the Commission of two qualified individuals to be assigned by the Commission for implementation of the United

States International Atomic Energy Agency Safeguards Treaty, following ratification of such treaty by the United States Senate;

(B) not less than $180,000 and six additional positions shall be included in the Division of Safeguards for the regulatory improvement of material control and accounting safeguards and the development of improved regulatory requirements for safeguarding the transportation of spent fuel; and

(C) not less than $9,675,000 shall be available for Nuclear Waste Disposal and Management activities,

including support for five additional positions in the Division of Waste Management for implementation of the Uranium Mill Tailings Radiation Control Act of 1978 (Public Law 95-604; 42 U.S.C. 7901 and following);

(5) not more than $213,005,000, may be used for "Nuclear Regulatory Research", of which promulgates regulations establishing demographic requirements for the siting of utilization facilities. Such regulations shall be promulgated by the Commission after notice and opportunity for hearing in accordance with section 553 of title 5 of the United States Code. For purposes of this section, the term

"utilization facility" means a facility licensed under section 103 or 104(b) of the Atomic Energy Act of 1954.

(b) The regulations promulgated pursuant to this section shall provide that no construction permit may be issued for a utilization facility to which this section applies after the date of such promulgation unless the facility complies with the requirements set forth in such regulations, except that regulations promulgated under this section shall not apply to any facility for which an application for a construction permit was filed or or before October 1, 1979.

(c) The regulations promulgated pursuant to this section shall

specify demographic criteria for facility siting, including maximum population density and population distribution for zones surrounding the facility without regard to any design, engineering, or other differences among such facilities.

(d) The regulations promulgated pursuant to this section shall take into account the feasibility of all actions outside the facility which may be necessary to protect public health and safety in the event of any accidental release of radioactive material from the facility which may endanger public health or safety. For purposes of this subsection the term "accidental release" includes, but is not limited to each potential accidental

release of radioactive material which is required by the Commission to be taken into account for purposes of facility design.

(e) The Commission shall provide information and recommendations to state and local land use planning authorities having jurisdiction over the zones established under the regulations promulgated pursuant to this section and over areas beyond the zones which may be affected by a radiological emergency. The information and recommendations provided under this subsection shall be designed to assist such authorities in making State and local land use decisions which may affect emergency planning in relation to utilization facilities.

(f) Nothing in this section shall be construed to provide that the Commission shall have any authority to preempt any State requirement relating to land use or respecting the siting of any utilization facility, except that no State or local land use or facility siting requirement relating to the same aspect of facility siting as a requirement established pursuant to this section shall have any force and effect unless such State or local requirement is identical to, or more stringent than, the requirement promulgated to this section.

Sec. 109.(a) Funds authorized to be appropriated pursuant to this Act may be used by the Nuclear Regulatory

Commission to conduct proceedings and take other actions, with respect to the issuances of an operating license for a utilization facility only if the Commission determines that-

(1) there exists a State or local emergency prepardness plan which-

(A) provides for responding to accidents at the facility concerned, and

(B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or

(2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists a State, local or utility plan which provides reasonable assurance that public health and safety

is not endangered by operation of the facility concerned.

A determination by the Commission under paragraph (1) may be made only in consultation with the Director of the Federal Emergency Management Agency. If, in any proceeding for the issuance of an operating license for a utilization facility to which this subsection applies, the Commission determines that there exists a reasonable assurance that public health and safety is endangered by operation of the facility, the Commission shall identify the risk to public health and safety and provide the applicant with a detailed statement of the reasons for such determination. For purposes of this section the term "utilization facility" means a facility required to

be licensed under section 103 or 104(b) of the Atomic Energy Act of 1954.

(b) Of the amounts authorized to be appropriated under section 101(a), such sums as may be necessary shall be used by the Nuclear Regulatory Commission to-

(1) establish by rule -

(A) standards for State radiological emergency response plans, developed in consultation with the Director of the Federal Emergency Management Agency, and other appropriate agencies, which provide for the response to a radiological emergency involving any utilization facility,

(B) a requirement that-

(i) the Commission will issue operation facilities only if the Commission determines that-

(I) There exists a State or local radiological emergency response plan which provides for responding to any radiological emergency at the facility concerned and which complies with the Commission's standards for such plans under subparagraph (A).

(II) in the absence of a plan which satisfies the requirements of subclause (I), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned, and

(ii) any determination by the Commission under subclause (I) may be made only in

consultation with the Director of the Federal Emergency Management Agency and other appropriate agencies, and

(C) a mechanism to encourage and assist States to comply as expeditiously as practicable with the standards promulgated under subparagraph (A) of this paragraph.

(2) review of all plans and other preparations respecting such an emergency which have been made by each State in which there is located a utilization facility or in

which construction of such a facility has been commenced and by each State which may be affected (as determined by the Commission) by any such emergency.

(3) assesses the adequacy of the plans and other preparations reviewed under paragraph (2) and the ability of the states involved to carry out emergency evacuations during an emergency referred to in paragraph (1) and submit a report of such assessment to the appropriate committees of the Congress within 6 months of the date of the enactment of this Act.

(4) identify which, if any, of the States described in paragraph (2) do not have adequate plans and preparations for such an emergency and notify the Governor and other appropriate authorities in each such state of the respects in which such plans and preparations, if any, do not conform to the guidelines promulgated under paragraph (1), and

(5) submit a report to Congress containing (A) the results of its actions under the preceeding paragraphs and (B) its recommendations respecting any additional Federal statutory authority

which the Commission deems necessary to provide that adequate plans and preparations for such radiological emergencies are in effect for each State described in paragraph (2).

(c) In carrying out its review and assessment under subsection (b) (2) and (3) and in submitting its report under subsection (a)(5), the Commission shall include a review and assessment, with respect to each utilization facility and each site for which a construction permit has been issued for such a facility, of the emergency

response capability of State and local authorities and of the owner or (operator or proposed owner or operator) of such facility. Such review and assessment shall include a determination by the Commission of the maximum zone in the vicinity of each such facility for which evacuation of individuals is feasible at various different times corresponding to the representative warning times for various different types of accidents.

Sec. 110.(a) Of the amounts authorized to be appropriated pursuant to section 101(a), such sums as may be necessary shall be

used by the Nuclear Regulatory Commission to develop, submit to the Congress, and implement, as soon as practicable after notice and opportunity for public comment, a comprehensive plan for the systematic safety evaluation of all currently operating utilization facilities required to be licensed under section 103 or section 104(b) of the Atomic Energy Act of 1954.

(b) The plan referred to in subsection (a) shall include-

(1) the identification of each current rule and regulation compliance with which the Commission specifically determines to be of particular significance to the protection of the public health and safety;

(2) a determination by the Commission of the extent to which each operating facility complies with each rule and regulation identified under paragraph (1) of this subsection, including an indication of where such compliances was achieved by use of Division 1 regulatory guides and staff technical positions and where compliance was achieved by equivalent means:

(3) a list of the generic safety issues set forth in NUREG 0410 (including ategories A, B, C, and D) for which technical solutions have been developed:

(4) a determination by the Commission of which technical solutions for generic safety issues identified in paragraph (3) of this subsection should be incorporated into the Commission's rules and regulations: and

(5) a schedule for developing a technical solution to those generic safety issues listed in NUREG 0410 which have not yet been technically resolved.

APPE

VOL.

ENDIX

III

90 Nos. 1657 (4)

Supreme Court, U.S.
FILED
APR 25 1991
CLERK

In the Supreme Court of the United States

October Term, 1990

COMMONWEALTH OF MASSACHUSETTS
SEACOAST ANTI POLLUTION LEAGUE,
NEW ENGLAND COALITION ON
NUCLEAR POLLUTION, TOWN OF HAMPTON
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, et al.
Respondents.

Appendix to Petition
for a Writ of Certiorari to the
United States Court of Appeals for
the District of Columbia Circuit
Volume III

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In the Matter of:

DISCUSSION AND VOTE ON EMERGENCY PREPAREDNESS RULE

DATE: JULY 23, 1980 PAGES: 1 thru 135

Washington, D.C.

AGENCY HOLDING THE MEETING:
Nuclear Regulatory Commission

TIME AND DATE: Week of July 21 (Revised)

PLACE: Commissioners' Conference Room, 1717 H St., N.W., Washington, D.C.

STATUS: Open/Closed (Changes)

MATTERS TO BE CONSIDERED:

Monday, July 21

9:30 a.m. Budget Presentations (Approx 3 hrs) (CLOSED-EXEMPTION 9)
- Inspection & Enforcement

2:00 p.m. Budget Presentations (Approx 3 hrs) (CLOSED-EXEMPTION 9)
- Nuclear Regulatory Research

Tuesday, July 22

1:00 p.m. Briefing by Executive Branch on Export Matter (Approx 1 hr) (CLOSED-EXEMPTION 1)

2:00 p.m. Budget Presentations (Approx 3 hrs) (CLOSED-EXEMPTION 9)
Nuclear Reactor Regulation

Wednesday, July 23

9:00 a.m. Budget Presentations (Approx 3 hrs) (CLOSED-EXEMPTION 9)
- Standards Development/ Nuclear Material Safety & Safeguards

1:00 p.m. 1. Discussion of Management Organization & Internal Personnel Matters (Approx 1 1/2 hrs) (CLOSED-EX 2 & 6)

2. Discussion and Vote on Final Rulemaking on Emergency Preparedness (Approx 2 hrs) (PUBLIC MEETING) (RESCHEDULED FROM 7/17)

Thursday, July 24

9:30 a.m. Budget Presentations (Approx 3 hrs) (CLOSED-EXEMPTION 9)
- Administration/EDO Offices

2:00 p.m. 1. Budget Presentations (Approx 3 hrs) (CLOSED EXEMPTION 9)
- Continuation of EDO offices/Commission Offices

2. Affirmation Session (Approx 10 min.) (PUBLIC MEETING)
   a. Pet. for Reconsideration-Denial of Intervenor Funding (TENT)
   b. Order in Psychological Stress at TMI (TENT)

3. Time Reserved for Disc. & Vote on Affirmation Items (if required) (Approx 15 min) (PUBLIC MEETING)

Friday, July 25

2:00 p.m. 1. Budget Presentations
(CLOSED-EX 9)
- Commission offices
(cont'd if required)

2. Discussion of Indian
Point - Approx 2 hrs)
(PUBLIC MEETING)

DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on July 23, 1980 in the Commission's offices at 1717 H Street, N.W., Washington, D.C. The meeting was open to public attendance and observation. This transcript has not been reveiwed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determinations or beliefs. No pleading or other paper may be filed with the Commission in any proceecing as

the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

DISCUSSION AND VOTE ON EMERGENCY

PREPAREDNESS RULE

PUBLIC MEETING

Nuclear Regulatory Commission
Room 1130
1717 H Street, N.W.
Washington, D. C.
Wednesday, July 22, 1980

The Commission met, pursuant to notice, at 2:35 p.m.

BEFORE:

JOHN F. AHEARNE,
Chairman of the Commission

VICTOR GILINSKY, Commissioner
JOSEPH M. HENDRIE, Commissioner
PETER A. BRADFORD, Commission

ALSO PRESENT,

L. BICKWIT
S. CHILK
M. JAMGOCHIAN
C. GOLLEE
A. KENNEKE
M. MALSCH
K. PERKINS
F. PAGANO
L. JOHNSON

Pages 1 through 135

PROCEEDINGS

CHAIRMAN AHERNE: The subject of the meeting this afternoon is to address further the emergency planning rule. Let me try to at least give a brief summary of some background. I am sure there are other items.

In December of '78 the Commission was briefed on a Joint NRC/EP Task Force report. We agreed to issue that for comment and it was sent out in December of 1978. It was issued for public comments. Obviously In March of '79 we had the Three Mile Island accident.

In June of '79 the Commission met to discuss emergency planning. Amongst other items, we address the GAO report on areas around nuclear facilities should be better prepared for radiological emergencies. In June of

'79 at that meeting requested establishing a task force on emergency planning and we also directed preparation of a notice of our intent to hold a rule-making on emergency planning.

In June of '79 we got a briefing on the progress of the task force. In July of '79 we sent out in advanced notice of proposed rule-making. The staff analysis of those comments have been published as a NUREG document. In September of '79 we got a briefing on the report of the task force on emergency planning. In November and December of '79 we hold at least four meetings to discussed the draft emergency planning rule. In December of '79 we published the proposed amendments for upgrading the emergency planning regulations, the draft rule.

In January of '80 there were regional workshops held in four sites in the country to describe and discuss the draft rule. In June of '80, early in June this year, the staff submitted their draft final rule, and that then received modifications and changes. In the middle of June we were briefed by the staff on the draft final rule. At the end of June we held a meeting to hear presentations from panels representing a broad spectrum of organizations and individuals concerned and interested in the rule. In the beginning of July we were briefed on the staff response to the panel presentations.

Now we have in front of us then a rule that has received a large amount of Commission attention. It has been

through the advance notice, public comment, draft rule and public comment. What I would today is to at least try to see whether we can't work through a number of the lastest [sic] comments that have been received by staff and by the Commissioners on the rule.

Prior to do that we have had one other major, I think, piece of advice on the rule, and that is the Congressional Authorization Committees have acted on the conference and have put some language into legislation. The general counsel has been discussing that issue with some of the Congressional staff and perhaps it would be appropriate, Len, for you to describe that.

MR. BICKWIT: Thank you, Mr. Chairman.

I guess it was approximately two weeks ago I had some telephone calls from the Senate Nuclear Regulation Subcommittee staff from Paul Leventhal and Keith Glazer expressing concern that the proposed final rule as they read it conceivably was not consistent with Congressional intent as it regarded the licensing of new plants. It did not make that representation with respect to the provisions in the proposed final rule related to existing plants.

CHAIRMAN AHEARNE: This rule was the draft that had been presented by the staff in June?

MR. BICKWIT: That is right.

CHAIRMAN AHEARNE: These are members of what committee staff?

MR. BICKWIT: This is the Nuclear Regulatory Subcommittee staff of the

Senate side. Their major concern was that it had been their understanding ...

CHAIRMAN AHERNE: One other question. Do the [sic] represent the majority or the minority?

MR. BICKWIT: They purported to represent only the majority in this discussion, although they suspected that the minority staff would subscribe to some of the things they were saying.

Their concern was that under the rule as drafted it was not clear to them that the Commission contemplated that in the absence of a plan, of a state or local plan which fully complied with the requirements of the rule that the Commission intended to look at the utility's plan to see whether that plan could conmpensate for the deficiencies of the state and local plans.

They said it was a central feature of the agreement reached in conference that that would be the case.

CHAIRMAN AHEARNE: Their concern was that our rule was too harsh?

MR. BICKWIT: That is true.

CHAIRMAN AHEARNE: Their interpretation of the Congressional action was that a more flexible rule was intended by the Congress?

MR. BICKWIT: That is correct. I told them, as I have told the Commission, that the way our office has read the legislation that the legislation provides for minimum requirements for a rule and therefore the Commission is free from a legal standpoint to be as stringent as it chooses to be under the law. They disagreed with that assessment.

Others I have spoken to on the Hill have expressed agreement with that.

COMMISSIONER BRADFORD: With which side?

MR. BICKWIT: Agreement with the interpretation I have given to the Commission.

CHAIRMAN AHEARNE: Which side of that interpretation? You indicated your view and then the Congressional staff's view.

MR. BICKWIT: The view that I have given to the Commission as opposed to the Congressional staff's view. What we have termed the Congressional staff's view may not be in fact the Congressional staff's view. It may be the view of only some among Congressional staff.

It was because it was unclear exactly what the staff as a group up on the Hill were saying that I thought it would be appropriate to see if the Members of the conference wanted to express themselves by letter on this particular subject.

In suggesting that to the Senate Nuclear Regulation Subcommittee staff they suggested that an alternative arrangement might be possible. This followed from my pointing out to them that there was a phrase in the Commission's rule which I felt would make that rule consistent with the Congressional intent as they understood it. That phrase states that the state and local plan need not comply with the requirements in the rule if alternative

compensatory actions are taken with respect t the deficiencies.

I told them that I believed it was the Commission's view that one of the alternative compensatory actions that might be looked at would be the actions taken by a utility in any kind of utility plan that might compensate for the deficiencies. I asked them if the Commission were to include language that specifically state that intent it would make the rule consistent in their view with the intent of the Congress as they saw it, and they said yes.

Again, they did not purport to be speaking for all Congressional staff, but they believed that would make things consistent.

Now, I want to reiterate my view that whether or not the Commission

chooses to do that is not a legal matter. As I read the legislation and the supporting legislative history, the Commmission is free to go beyond the minimum requirements set by the Congress. I believe this to be true despite the fact that Congressional staff representations are to the contrary. I believe Congressional staff representations at this point, or even representations by the Members of the Congress themselves, would not have legal weight. So I think that the Commission's options are not limited by these expressions of opinion.

However, if it is the commmission's view that alternative compensatory actions would include a look at the utility's plan to see whether that plan was in fact compensatory, then I would

suggest stating that in the supplementary information associated with the rule. I have proposed some language which you have before you as Enclosure 1.

CHAIRMAR AHEARNE: Len, when you say that you discussed with other people on the Hill and they supported your other position, were these people involved in the conference?

MR. BICKWIT: Yes. I am talking about people on the House side. So that it was a somewhat confused communication that I was getting from the Hill. As a result I felt if the Congress were to express themselves on this particular issue it would be best that it be done by letter. At this point I see no need for such a letter. I would see no need for it from a legal standpoint in any event.

CHAIRMAN AHEARNE: I am not confused by what you are saying. Are you saying that you talked to staff members who participated in the conference and some had one interpretation and some had another?

MR. BICKWIT: That is right. That is what I am saying. I am saying that the only members of the Congressional staffs which have clearly expressed themselves as saying that our proposed final rule was inconsistent with Congressional intent have now agreed that this particular language would make it consistent with that intent. As I finished that sentence I think I have to retract it to some degree ---

(Laughter.)

MR. BICKWIT: --- because at this point I do not know exactly where the

minority staff of the subcommittee stands on this question.

CHAIRMAN AHEARNE: So what you are saying is that you are confident that the majority staff of the Senate subcommittee would agree that the language that you have is consistent with the intent of the Congress?

MR. BICKWIT: That is right. I have made an inquiry of the minority staff and I have not had an answer.

CHAIRMAN AHEARNE: You are not sure also what the opinion would be of either the majority or minority staff of the House side?

MR. BICKWIT: I am not.

COMMISSIONER GILINSKY: You are now referring to Enclosure 1.

MR. BICKWIT: I am referring to Enclosure 1.

COMMISSIONER HENDRIE: Enclosure 1, when you say at the end of the first paragraph on page 6, there are several versions ---

CHAIRMAN AHEARNEL I would suggest you work on the last document, the one that SECY distributed.

COMMISSIONER HENDRIE: 7/15/80.

CHAIRMAN AHEARNE: That at least had all of the previous changes.

COMMISSIONER HENDRIE: Oh, I see where it goes. Okay.

CHAIRMAN AHEARNE: Now, does everybody have that version.

MR. BICKWIT: About six lines down.

COMMISSIONER HENDRIE: Would any part of Enclosure 1 language then also occur over at the top of page 39?

MR. BICKWIT: I don't think that is necessary.

COMMISSIONER HENDRIE: Having explained it up in the front end, why there is no need to put the explanation in the actual rule.

MR. BICKWIT: That is right. You are explaining what that language means as it is used in the rule.

COMMISSIONER HENDRIE: Okay, good.

MR. BICKWIT: Again, if that is not what you meant, I see no legal reason for the Commission to adopt that language as a result of these communications. It if is what you meant, I think it would be appropriate to include that lanquage on page 5.

COMMISSIONER HENDRIES: Let's see, the language is drawn right out of the Authorization Act, right, section 10.

MR. BICKWIT: No, it is not.

CHAIRMAN AHEARNE: It is not in the Authorization Act. It is drawn out of the conversations Len has had with the Majority Members of the Senate subcommittee.

MR. BICKWIT: That is right.

COMMISSIONER HENDRIE: Well, there is a certain parallel. Section 109(2) of Public Law 96-295 says "In the absence of a plan which satisfies the requirements of paragraph 1", i.e., everybody has checked off on it "there exists a state, local or utility plan which provides reasonable assurance that public health and safety is not endangered by operations of the facility itself."

This says "In determining the sufficiency the Commission will examine state plans, local plans or licensee

plans to determine whether features compensate" et cetera, et cetera. It is not identical.

CHAIRMAN AHEARNE: Will you comment on the two points raised?

COMMISSIONER HENDRIE: Well, I would be inclined to put in Enclosure 1 as he has suggested.

Now, what is the other point?

MR. BICKWIT: Enclosure 2 is an entirely seperate matter.

COMMISSIONER HENDRIE: We ought to settle Enclosure 1.

CHAIRMAN AHEARNE: Vic or Peter?

COMMISSIONER BRADFORD: I have no problem with Enclosure 1, but I would prefer to say alternative equally effective compensatory action instead of simply alternative compensatory actions. I would still have no problem with using Enclosure 1.

CHAIRMAN AHEARNE: Len?

MR. BICKWIT: That is a policy question.

CHAIRMAN AHEARNE: You are the one who has held these discussions.

MR. BICKWIT: I am not sure what your question is.

CHAIRMAN AHEARNE: My question is, your presentation of this paragraph was this is a paragraph which I gather Mr. Leventhal and Mr. Glazer would agree tracks with the conference's intent.

MR. BICKWIT: They would agree that Peter's language tracks with the conference's intent, if that is your question.

CHAIRMAN AHEARNE: Yes, that was my question.

Peter, where would you stick those two in?

COMMISSIONER BRADFORD: I would just put the words equally effective in between alternative and compensatory in our rule. So it is not really an insert to Enclosure 1.

COMMISSIONER HENDRIE: You proposed that kind of language in a number of places in the statement of considerations and the rule language itself and I would like to hold and debate that point later on because I have some problems with that terminology.

CHAIRMAN AHEARNE: Victor?

COMMISSIONER GILINSKY: Yes, that is fine.

CHAIRMAN AHEARNE: Who is keeping track? Mike, you are keeping track. I think we all then agree with the inclusion of that paragraph. There is a hold question on Peter's alternative

"equally effective" because that, as Peter points out, that is really a phrase that is throughout the rule.

Len, why don't you address your second enclosure and then we are going to have to go through a whole set of things Peter has proposed.

MR. BICKWIT: The second enclosure is simply designed to conform the supplementary information of the rule with the text of the rule as it is proposed to be adopted.

The proposed language in the rule as you now have it before you is not alternative "A" as that alternative existed in the original proposed rule. It is a more flexible version of alternative "A". This simply states that clearly.

Our feel was that without a statement of this kind some might be under the misimpression that the Commission had adopted alternative "A" as its choice for lamguage, and the Commission has not done that.

Consistent with that change we would also propose that the last sentence on page 3 carrying over to page 4 would be deleted.

CHAIRMAN AHEARNE: Why?

COMMISSIONER HENDRIE: Well, wait a minute. Let's start on page 22.

COMMISSIONER BRADFORD: I ought to just note that I had also revised that same paragragh for some of the same reasons, but since some of my changes went in another direction, why my phrasing was slightly different.

CHAIRMAN AHEARNE: Perhaps we ought to wait then until we get to page 22.

COMMISSIONER BRADFORD: I agree with Len's point. If in fact the rule stays the way it is then I would vote for Enclosure 2 because it is not a straight alternative "A".

CHAIRMAN AHEARNE: Yes. I think then we ought to hold that one in abeyance.

COMMISSIONER BRADFORD: Fine.

COMMISSIONER HENDRIE: Well, I doubt there is much dispute. What we could do is sort of tentatively agree to take Len's recommendation and then when we get to that point we could see what changes he might want to work upon the Enclosure 2 language.

Len, you don't mean the first two sentences, do you?

MR. BICKWIT: On page 22?

COMMISSIONER HENDRIE: Yes. You mean the first sentence, don't you?

MR. BICKWIT: I think I did mean the first two.

COMMISSIONER BRADFORD: You just dropped the discussion of alternative "B" altogether?

MR. BICKWTT: No. I think what you are referring to is the Commission's choice is consistent with most of the comments received from state and local governments.

CHAIRMAN AHEARNE: And consistent with the provision.

MR. BICKWIT: Yes.

COMMISSIONER HENDRIE: That continues to be the fact so far as I know.

MR. BICKWIT: I am not sure the first part of that sentence is right. I don't know whether most of the comments referenced this particular change in alternative "A".

CHAIRMAN AHEARNE: Let me ask. Mike.

MR. JAMGOCHIAN: I am sorry, I am writing. What was the question?

CHAIRMAN AHEARNE: This is on page 22. This is the major paragraph on page 22. It says "After careful consideration," that paragraph.

MR. JAMGOCHIAN: Yes.

CHAIRMAN AHEARNE: The second sentence, "This Commission choice is consistent with most of the comments received from state and local governments." General counsel is asking is that accurate.

MR. JAMGOCHIAN: Yes, sir.

COMMISSIONER HENDRIE: Enclosure 2 replaces the first sentence.

MR. BICKWIT: The first sentence, right.

COMMISSIONER BRADFORD: No, because that is the third sentence that you are talking about now. The second sentence is the one that becins "Alternative B."

CHAIRMAN AHEARNE: No.

COMMISSIONER BRADFORD: No?

COMMMISSIONER HENDRIE: You have got the wrong draft.

COMMISSIONER BRADFORD: Have I got the wrong draft? I am working from my draft.

CHAIRMAN AHEARNE: July 15th.

COMMISSIONER BRADFORD: The alternative "B" discussion is gone anyway. I have that also.

(Laughter.)

COMMISSIONER BRADF0RD: I can only work from three drafts at a time.

(Laughter.)

COMMISSION BRADFORD: The sentence I would like to get rid of is the one ---

CHAIRMAN AHEARNE: I think we really have to work through page by page and then we will get to yours.

COMMISSIONER BRADFORD: Okay.

MR. BICKWIT: One other thing. In light of my statement we are all right on leaving that sentence on page 3 going over to page 4.

MR. JAMGOCHIAN: Actually it should say "similar to alternative "A" if you are going by your Enclosure 2. It would be more accurate.

MR. BICKWIT: Has adopted a version similar to ---

MR. JOHNSON: Similar to alternative "A".

MR. BICKWIT: Similar to alternative "A". I would prefer that.

CHAIRMAN AHEARNE: Well, let's start back at the beginning if we can because we have got enough changes on various pages. So let me start with page 1.

COMMISSIONER BRADFORD: Let me ask a question about the history of this document. Is this the same as 275 as modified by 275-A and B?

MR. CHILK: And the comments that were made.

COMMISSIONER BRADFORD: Commission office comments, okay.

CHAIRMAN AHEARNE: But put into a clean version.

COMMISSIONER BRADFORD: Right.

CHAIRMAN AHEARNE: As a result a number of the pages now are different.

COMMISSIONER BRADFORD: Yes. The page number doesn't trouble me, but it would not be safe even to be using 275-B as identical to what SECY circulated.

CHAIRMAN AHEARNE: Right.

MR. CHILK: Almost everything that you have can be tracked.

CHAIRMAN AHEARNE: Hopefully everything can be tracked.

(Laughter.)

COMMISSIONER BRADFORD: But one may have to have some things that we don't have to track it.

COMMISSIONER AHEARNE: Let me start on page 1.

Carl.

MR. GOLLER: It would be useful to summarize what that particular copy does

include or does not include. The version that was submitted by the staff on the 15th includes all of the changes of the staff recommended to the Commission in SECY 80-275-A and all the changes in 275-B. In some cases one superseded the other. It includes all changes that were suggested in the memo by Mr. Sauter of July 11, 1980, to all of the Commissioners. It includes changes that were indicated to the Commission in a note to the SECY relative to changes that were necessary to conform the rule to the latest FEMA rulemaking. This was noted in detail.

CHAIRMAN AHEARNE: That was a note from you.

MR. GOLLER: Yes, sir. It also includes a considerable number of editorial changes that were received

from a variety of sources, some from the staff, some from Mr. Sauter and some from other Commission offices, none of which, in our opinion, change the intent or the substance of the rule, but all of which are improvements and are truly editorial changes.

This version does not include one correction which should have been included in the changes I just indicated, which was a deletion of a phrase on page 49 in item two relating to the provisions that would be made for transients which was identified in 275-A. This was an oversight.

CHAIRMAN AHEARNE: It was the deletion of a phrase and the addition of another sentence.

MR. GOLLER: The addition of another sentence which went further

toward clarifying. This was simply a typographical oversight and a correction that does need to be made. It does not include the two suggested changes by way of enclosures that we have just been discussing that originate from OGC, and it does not include any further changes most recently identified by Commissioner Bradford.

CHAIRMAN AHEARNE: That would have been very difficult.

COMMISSIONER BRADFORD: That would have been hard to get in.

CHAIRMAN AHEARNE: Yes.

All right, can we start on page 1. The question on page 1, Peter, you in many places have changed "appropriate" to "effective." Can you describe what the significance of that is?

COMMISSIONER BRADFORD: Appropriate just to me is a lazy word. It is sort of a substitute for thought. "Effective," means something. It doesn't mean a whole lot more, but it means that we actually think they will work.

CHAIRMAN AHEARNE: Can I ask the Standards office to tell us whether there is any difference from a regulatory standards approach on "effective" versus "appropriate."

MR. GOLLER: Yes, sir, we think that there is a substitute difference between those two words.

COMMISSIONER BRADFORD: It could be ineffective and still be appropriate?

(Laughter.)

MR. COLLER: No, sir, but I think there is a difference in meaning between the two words as used.

CHAIRMAN AHEARNE: Could you try to describe difference?

MR. JAMGOCHIAN: In going through your comments, and we only had about a half hour to go through them, in a real quick analysis, when you have an emergency you take appropriate protective measures. Now, you have to consider the weather. You have to consider a lot of things. You may not evacuate because of six or ten inches of snow outside. You just may take shelter. That would be appropriate, but in some people's minds that may not be totally effective. We have gone all along in our regulations that you take appropriate protective measures. You know, who determines what you have done is really effective?

COMMISSIONER GILINSKY: Well, appropriate means you take the right ones. The way you chose the right ones is on the basis of effectiveness. Now, they may not be totally effective.

MR. KENNEKE: Mike's point is some measures may reduce your dose further but may increase your risks of other kinds.

MR. JAMGOCHIAN: With appropriate you take everything into consideration.

MR. KENNEKE: You might save another ten rems by driving through a crowd but it might endanger your life to do so.

MR. JAMGOCHIAN: Right.

MR. KENNEKE: So that says it would be inappropriate although more radiologically effective.

MR. JAMGOCHIAN: Effective, yes, sir.

MR. KENNEKE: I think their interpretation of effective means radiologically effective whereas appropriate means effective in an overall risk kind of context.

COMMISSIONER BRADFORD: But we are making a finding as to whether a particular plan provides reasonable assurance that effective or appropriate, but I am saying effective measures can be taken. It seems to me if we can't say that the plan provides reasonable assurance of effective measures then we ought to be thinking some more. I mean if in fact the climate is such that it is so likely that the measures which we would consider appropriate would not also be effective, then there are some

serious questions about a plan in that climate.

MR. JAMGOCHIAH: Isn't effective more inclined to be looked at as after the fact?

COMMISSIONER GILINSKY: No, but this has to do with a finding before the fact, as Peter points out. In other words, it may turn out that you were wrong, but in making the finding initially it seems to me that you have to make it on the basis that you think that offective action will be taken, or it least you have reasonable assurance.

CHAIRMAN AHEARNE: Mike, why don't you and Carl come up here to the table.

MR. GOLLER: Before you take actions which you consider appropriate which might even be anticipatory, it may turn out that they were unnecessary or

the accident had taken some different course and the action you took wasn't effective at all.

COMMISSIONER GILINSKY: But that is a whole separate question.

CHAIRMAN AHEARNE: Mike and Carl, sit down, please. I suspect you will be here a while.

(Laughter.)

(At this point Messrs. Goller and Jamgochian take seats at the table.)

COMMISSIONER GILINSKY: You are talking about findings that one is making in advance of any exercise of these plans or measures.

CHAIRMAN AHEARNE: Let me ask the lawyers -- really no intent meant, Peter. Let me ask general counsel.

MR. BICKWIT: I agree with Standards that there is a difference.

COMMISSIONER BRADFORD: Yes, I agree that there is a difference.

COMMISSIONER AHEARNE: What kind of difference?

MR. BICKWIT: The difference, I think they hit it on the head, that appropriate entails some interest balancing, whereas effective is an absolute word. It is either effective or it isn't effective. So in answer to your question, it could be ineffective and appropriate in the sense that it would not be totally effective. It could be appropriate without being totally effective.

CHAIRMAN AHEARNE: Let me ask you, Len, let's just consider that we are trying to do an assessment of the emergency planning measures of a plant, any particular plant. Whether it our

staff or FEMA staff that is looking at that, what kind of a criterion would they be looking at? Would they be trying to judge whether the measures that are being proposed, if I say they are appropriate doesn't the sense of appropriateness carry with it the sense of what is appropriate is something that would be effective?

MR. BICKWIT: Yes, but if you are asking me whether there is a difference, I think we all perceive a difference here. The policy judgment is do you want them ---

CHAIRMAN AHEARNE: Let's not say "we" because, unfortunately, my problem is that I am not seeing the difference.

MR. BICKWIT: I see. Well, I think there ought not to be a difference. There could be a difference.

CHAIRMAN AHEARNE: Well, I don't think there ought to be a difference.

COMMISSIONER HENDRIE: If there is a difference, those people that perceive a difference ought to vote for appropriate.

COMMISSIONER BRADFORD: Oh, no.

COMMISSIONER HENDRIE: Yes, because the proper action for protection of the public in some circumstances may be no action. Okay?

COMMISSIONER BRADFORD: That may also be the effective action.

COMMISSIONER HENDRIE: If you perceive a difference and would rule out in some peculiar circumstance zero action as being ineffective on the face of it, then you have to agree that approprite is the word that is needed here.

COMMISSIONER BRADFORD: On the contrary, what I am saying is that at the point where a finding is being made what we are doing here is setting the finding that is necessary for a license or for operation. If you are confronted by a situation in which the only effective action is one of the sort that somebody, perhaps it was Al who hypothesized that people would have to drive through a crowd in a hurry to get away, and you could say, all ri:ght, that plan can be licensed because then the effective action is going to be for that person to say where they are and not get away. I am saying that is not a standard I am prepared to accept. If at that point in time you cannot make the finding that there are effective actions contemplated by the plan and that you

have reasonable assurance of being able to do them, never mind if there is a tornado blowing or something of that sort, then I don't think the finding ought to be made.

I do see a difference in the sense that the word "appropriate" -- it is as though you had two circles and then they overlap. There is hopefully a very substantial area in which appropriate and effective mean the same thing, but there is an outer shading to appropriate in which you could rationalize the situation by just shrugging and saying, well, the appropriate action unfortunately is going to do a lot of damage but we still agree it was the appropriate thing to do and the plan should be there.

What I am saying is that in that area where the finding could be that the action is appropriate but could not be that it is effective, I would have some doubt about the feasibility of making a finding that would permit a license.

COMMISSIONER HENDRIE: You would conclude that even though in a particular case the judgment might be that in 99 percent of what are already not frequent events effective action could occur but that in one percent of such events it might be questionable whether effective action could be taken that would deny a license?

COMMISSIONER BRADFORD: No, I don't think so. I am not sure I am following you, but if you have 99 percent assurance that seems to me to be reasonable assurance.

COMMISSIONER HENDRIE: Well, it certainly to my view is reasonable assurance in terms of the statutory standard. What I am pointing to here is that the difference perceived between effective and appropriate, the word "effective" to the staff, and I think it carries also for me, the sort of connotation that all of these measures in all cases will have to reduce dose and so on, that we cannot contemplate any circumstance in which that might not happen.

You then are confronted with the following situation anywhere north of some reasonable latitude that for one day in every four or ten years or whatever you will have a sufficient snow blockage of the roads so you can't evacuate. If something happens on that

day you aren't going to be able to move people out and you take appropriate action. That means telling them to stay inside which they will probably end up doing involuntarily but it is certainly not the most effective action, or may not be the most effective action for people close in.

To use the word "effective" throughout the rules suggests that that in an impermissible situation and I think it is that connotation which worries some of us who see a difference between the two words.

CHAIRMAN AHEARNE: Let me ask Peter whether that is the connotation he means?

COMMISSIONER BRADFORD: It seems to me that for the kind of situation which you are talking about, abnormal weather conditions or sort of a meteorite

hitting the plant which produces an instant release of large quantities of radioactivity and thereby denies you all of the warning times, assumptions about warning times that are built into the system, that those are likely to get swept away under the reasonable assurance question.

What one is worried about is a situation where an accident occuring on what we might call normal weather with normal warning times you would still be unable to make a finding that effective action could be taken. That is the situation which I am saying. If you can't make that finding, there probably shouldn't be a plan.

CHAIRMAN AHEARNE: Al, did you have something?

MR. KENNEKE: Let me make a suggestion that it seems to me the difference is one of two general approaches to effective action. That is shelter versus evacuation. I think it is evident in the conversation.

I guess I would agree with Commission Bradford that if one would say that the typical conditions are such that you can expect people to be unable to reach shelter because of probable weather conditions then I think he definitely has a strong point. If that is not a question, then we really are splitting hairs over the word "effective" because we really choosing between the relatively effective choice of shelter and evacuation. The evacuation may reduce the dose more but it may be an overall greater risk to

achieve. So let me suggest a different phraseology that perhaps could split the difference if I may.

CHAIRMAN AHEARNE: If we say effective and appropriate that is not splitting hairs.

(Laughter)

MR. KENNEKE: I thought about it first, but it didn't go over very well. Let me try it and maybe it comes to the same thing. I don't think so. Reasonable assurance that an appropriate choice of effective protective measures that can be taken will be made. That is a little different than effective and appropriate.

COMMISSIONER GILINSKY: There is one qualifier in reasonable assurance. If you put in appropriate there is

another qualifier. It is sort of a hedge word.

CHAIRMAN AHEARNE: Carl.

MR. GOLLER: He just touched on the point that I think indicates that "appropriate is the right word. In many case there might be more than one effective way of doing something. There might be any number of effective ways. One best way, that is the appropriate way, that is what you want to ask for.

COMMISSIONER GILINSKY: Any one of them would qualify for effective.

MR. GOLLER: You don't want any one of them. You want the appropriate one.

COMMISSIONER BRADFORD: Wait a minute. There is nothing about appropriate that requires you to choose the best.

MR. GOLLER: That I think is inherent in the word "appropriate" is that you want the best.

CHAIRMAN AHEARNE: I was going to ask Peter what his reaction to Al's suggestion was?

COMMISSIONER BRADFORD: Well, Victor already I think articulated it. I would look for the flexibility in this sentence in the phrase "reasonable assurance." For me it is enough that a reasonable man assessing the plan reasonably would find reasonable assurance of effective protective measures. The blizzard every four years or the bridges being out at the time of the accident I think have to be taken as adding to the original low probability of the accident and not falling within the reasonable assurance question.

In the way I have heard the word "appropriate" being used would suggest that there really is within it no barrier to siting a plant in a heavily populated area because in that situation the appropriate action will in all likelihood be shelter because evacuation will never be possible.

MR. JAMGOCHIAN: What about deleting "effective" or "appropriate"? Reasonable assurance that protective measures can and will be taken.

COMMISSIONER GILINSKY: Well, that is kind of weak because that doesn't say much of anything. It is reasonable assurance that the public will be protected is what this is all about. That is what our regulations say that the public will not be endangered, or something like that.

CHAIRMAN AHEARNE: Victor, you had a comment.

MR. BICKWIT: How about the statutory standard, legal assurance that the public will be adequately protected?

CHAIRMAN AHEARNE: In the event of a radiological event.

Well, Peter?

COMMISSIONER GILINSKY: It seems to me that reasonable assurance of effective protection adds up to adequate protection.

MR. KENNEKE: I think the staff's fear is that words as written will drive the reviewer to say that only evacuation ---

COMMISSIONER GILINSKY: There is nothing here about evacuation.

MR. KENNEKE: No, but I think that is what is behind their concern, that

there has to be an option besides evacuation.

COMMISSIONER GILINSKY: I mean Joe brought up the question of evacuation versus people staying indoors. Now, as far as I understand your views, you regarded that as effective protective action.

MR. BICKWIT: Why don't you strike "reasonable assurance"?

(Laughter.)

MR. BICKWIT: I don't see how the Commissioners can say that the statutory standard is the wrong standard. I mean, it is the one that we use all the time. So why don't you simply say that onsite and offsite emergency preparedness will adequately protect the public in the case of a radiological emergency?

CHAIRMAN AHEARNE: Do you have any problem with that?

COMMISSIONER BRADFORD: Well, if the inclination is to go in that direction I would just change effective to adequate in the formulation I have already proposed. Then the phrase becomes adequate protective instead of adequate protection, but I think that is close enough.

CHAIRMAN AHEARNE: Any problem with adequate? The difficulty I am having is that I would have always thought that appropriate would have been effective.

COMMISSIONER GILINSKY: That is what I thought.

CHAIRMAN AHEARNE: But you see I worry because Peter if finding a problem with appropriate. All of them seem to be equivalent to me.

COMMISSIONER GILINSKY: Appropriate is a vaguer word.

CHAIRMAN AHEARNE: Once the lawyers start telling me, well, no, they are a little bit different, then I feel very uncomfortable because I am not sure what all the nuances really mean.

MR. KENNEKE: The implication in Commissioner Bradford's terms as I see his objection, is that you may do literally nothing to reduce the dose. In their case you have only one option.

CHAIRMAN AHEARNE: But you see the problem I am having is that the interpretations of the misuse of the language is outside of the -- what is that nice phrase that you introduced at one time -- rule of reason.

MR. KENNEKE: Adequate sounds like a good splitting in the middle that both

sides could live with. It wouldn't be a code word to either side.

CHAIRMAN AHEARNE: Peter, adequate is adequate?

COMMISSIONER BRADFORD: Adequate is adequate.

CHAIRMAN AHEARNE: Joe?

COMMISSIONER HENDRIE: I think the word you really want is appropriate.

(Laughter.)

COMMISSIONER BRADFORD: The word you really want is appropriate.

(Laughter.)

COMMISSIONER HENDRIE: To the extent that people see some sort of climbing scale of rigor in the requirements then that worries me with regard to moving off suddenly to a new word.

Now, if somebody tells me, as you do, John, that it seems to you that the appropriate measures are effective, you know, as they turn out in a given circumstance and they are also adequate in the context of the circumstances, then I can agree with you that any one of the three words would serve because they mean about the same.

If we have decided now, having worked on the rule for, what, 15 months, or something like that, that on the day we had hoped to come to a final vote that we are now going to establish a new standard for emergency planning by using "effective" instead of "apppropriate", why of course we say, wait, let me think about what that means.

You know, are you now driving in the direction to say let me ask, what do

we mean by effective? You said, no, it doesn't mean that there may not be circumstances where it turns out that what will have to be done is nothing and people just stay where they are. That is all right. If you say, well, if that is the best you can do most any time, why that is a problem. All right, no difficulty with that. So you tell me, no, it doesn't mean every time. Does "effective" mean that people don't get any exposure?

COMMISSIONER BRADFORD: No. Incidentally, I think we have gone from effective to adequate, or at least I have. But answering for either one, I wouldn't have said it meant no exposure because the whole rest of our rules don't anywhere take the position that zero exposure is required to assure

adequate protection of the public health and safety.

COMMISSIONER HENDRIE: As a matter of fact, the whole thrust of the rule as I perceive it is that we do things with plant design and operation to try to keep things from happening. Then you say if something does happen it seems sensible to us to have pre-existing plans and notification means so that we can take whatever measures are practical to be taken in the particular circumstances as they may occur to reduce the radiological hazard. The circumstances may allow that to be extremely attractive. That is, there may be ample warning times, and I have got a feeling that is probably the likely event, and that indeed

you could move people out in a considered, you know, not hurried way from around the plant and indeed essentially eliminate the potential high exposures close in.

It also contemplates that things may move faster than that and that the best you could hope for is to get word to people to get inside and that some people will hear it and get the word and get inside and some won't, but that there will be some reduction in the exposure by viture of having gotten some more people inside than would have been the case if you hadn't tried.

This whole range of actions that may take place following any given circumstance, what you want is a plan that sort of gives you a reasonable basis for recommending those actions to

people and having your local police force attempt to implement them.

Now, if there is also as you read the rule some sort of requirement here that this to guaranteed in all circumstances and result in either zero or very low exposures in all circumstances, then I must say that goes well beyond the place that I see emergency planning and in fact to a place that I don't think can be achieved. So I have concern about, you know, the changes proposed from appropriate to effective and I can't quite decide whether adequate is, you know, back down a step or is it at the same level laterally or where it is.

It worries me that these words now appear to be coming in late in the stage of consideration of this rule that seem

to have an implication that we are establishing a new standard not contemplated in the comment period and the extensive discussions we have had heretofore. Now, maybe it simply reflects final writer focusing and more careful focusing of our individual views on the matter, but I am not all that happy to go through at the last minute and change a lot of words which clearly have implications that I have trouble seeing where they lie.

COMMISSIONER BRADFORD: Obviously with the concurrence of others I wouldn't insist on a vote today, although I would like to be able to vote today, but I certainly wouldn't want to do it in the face of feeling that stuffy I have circulated at the last minute puts you under the gun like that.

COMMISSIONER HENDRIE: I think it is more than me. What I am trying to discern is, you know, should I perceive this now as presenting a second language in which commenters haven't had a chance to sense what all is here and make comments as they might if they had so sensed. I don't know. I can't tell where you are going with effective. What does it mean.

COMMISSIONER BRADFORD: Let me trying that once more. First of all, as to the business of guaranteed that no one will be exposed or that you would be able to evacuate a hundred percent of the time under all conditions, I really think the phrase "reasonable assurance" takes care of that and that there is obviously a difference between having reasonable assurance or something and

having a guarantee. No one would say that those were synonymous.

For the rest, it is one thing to say that within the framework the plan you would expect there would be some days in which the best you could do would be to recommend sheltering. I agree that that is true and certainly that the plan should contemplate that under those conditions that that is what would be recommended and shouldn't compel you to try to evacuate when you couldn't do it.

COMMISSIONER HENDRIE: As a matter of fact, Peter, there will be some days when you won't be able to execute the plan at least for limited periods because anything like a siren system is bound to have a down time, you know, of

I don't know what, but some small fraction.

COMMISSIONER BRADFORD: But at the moment you are making the finding about the plan's adequacy for the future, then it doesn't seem to me that the plan has to be found inadequate just becauce you know that there are going to be some periods of time when you can't do that which you would really like to be able to do whether because of the conditions of the accident or the conditions of the weather.

I do think that the finding as to what you would expect to prevail during normal or even somewhat less than normal conditions ought to be of a level of adequacy of effectiveness. What I have gathered from the staff comments with regard to what they parceive as the

difference between adequacy and effectiveness on the one hand versus appropriateness on the other is that there really could be situations in which the word "appropriate" would be taken -- and by situations I mean at the time the plans were being reviewed -- the word "appropriate" would really be taken as meaning more or less do the best that you can.

CHAIRMAN AHEARNE: As a normal mode.

COMMISSIONER BRADFORD: As a normal mode. I do think that the word "adequate" or "effective" takes you a level higher than that.

COMMISSIONER GILINSKY: That is what I thought I heard Joe say. I hope I misunderstood you, but you seem to be saying that what we need is to have

assurance that if something happens they will do the best they can.

CHAIRMAN AHEARNE: But you always want to do the best you can.

COMMISSIONNER GILINSKY: What we are saying here is that that best will be pretty good in most circumstances and that is where the reasonable assurance comes in. In other words, what we really want to do is have reasonable assurance that people aren't going to get irradiated to any unhappy degree. That doesn't obviously cover every circumstance and it doesn't mean that when plan in generally effective there won't be some people who aren't going to get picked up in it, but it does mean that we want them to do a bunch of things that will bring thier general

level of performance up in most circumstances, doesn't it?

COMMISSIONER HENDRIE: I don't think so.

CHAIRMAN AHEARNE: I think we all agree that the weight that is in a single word is enormous, clearly. Now, Len has proposed a point which I wonder if it is possible. I don't know where we are going to end up today. In fact, I don't know if today's meeting is going to be the only one of many. Len had pointed out that it might be important to have as a record of decision underlying where we end up the transcript of the meeting.

Let us suppose we choose adeqaute. I think Joe is beginning to be willing almost accept that. I am willing to accept it and I think the other two are

willing to accept it. If we choose adequate, just embedding the word "adequage" isn't going to even begin to describe what we meant by it. Whereas, if the treanscript of the meeting underlay the decision that might be of help to some people who are trying to figure out what do we mean.

Mr. KENNEKE: May I try one more time?

CHAIRMAN AHEARNE: Wait a minute.

COMMISSIONER BRADFORD: The point there being that we would treat this as an official rather than an unofficial transcript?

CHAIRMAN AHEARNE: Yes.

COMMISSIONER BRADFORD: That also contemplates reviewing it then.

COMMISSIONER GILINSKY: I think if we want to make clear what we mean we

ought to write it down and agree on a statement.

MR. KENNEKE: May I try one more time, Mr. Chairman?

CHAIRMAN AHEARNE: I just don't think you are going to get there. If there is this much meaning latent in one word, then there is no way you are going to get everybody to agree on what that means.

MR. KENNEKE: Can I crash myself against the rock one more time?

CHAIRMAN AHEARNE: Of course.

MR. KENNEKE: The staff by their holding out for appropriate, as I read it, they want a choice of measures. Commissioner Bradford wanted to make the point that whatever measure is chosen is effective in significantly reducing dose.

COMMISSIONER GILINSKY: In most circumstances.

MR. KENNEKE: In most circumstances, not an absolute guarantee. So one other thing you might do is simply put a parenthetical after the word "measures" that says "including sheltering and evacuation" which is at least the minimum choice that they need. It also implies on the face of it that evacuation and sheltering can be effective in the terms that I think you wish without changing any other words. That deals with Commissioner Hendrie's concern about changing the words throughout.

COMMISSIONER GILINSKY: Can I ask a question?

CHAIRMAN AHEARNE: Go ahead.

COMMISSIONER BRADFORD: Go ahead. Yes, by all means.

COMMISSIONER GILINSKY: Carl, does appropriate not mean to you that in most circumstances the action will be effective?

MR. GOLLER: Yes, in most circumstances.

COMMISSIONER GILINSKY: The most circumstances is taken up in the reasonable assurance. Then what is your objection?

CHAIRMAN AHEARNE: I could also ask the opposite though of you, Victor. If you agree with that then you should have no problem with appropriate.

COMMISSIONER GILINSKY: I don't think so.

MR. GOLLER: Let me point out that in following sentences of that paragraph

the word "adequate" is used several times in relating it to FEMA's findings. Therefore, the word "adequate" might be the preferred word in that the balance of that sentence goes on to enumerate or define what is meant by adequate.

MR. JAMGOCHIAN: Well, if I may approach that. In writing this there was some concern as to whether we should put down adequate, appropriate or effective. In the other sentence that Carl brought up relative to the plan itself I used the word adequate because in writing a plan a licensee and we, NRC, can judge what an adequate plan is. He has got good communications, good notification, good assessment capabilities and good training. That is an adequate plan.

I stayed away from adequate and effective protective measures because how do you plan for effective protective measures. You know, that is usually after you have had the accident you then say, yes, those were effective protective measures. How would we judge that a licensee planned for adequate or effective measures? That depends on so many parameters.

COMMISSIONER GILINSKY: You have got some standard, and the standard is you want in the event of an accident up want an adequate plan.

COMMISSIONER HENDRIE: You want an adequate plan before the event, if there ever is an event. If an event occurs you want to be sure that appropriate measures have and will be taken.

COMMISSIONER GILINSKY: You want to be sure, reasonably sure that on the basis of this plan action will be taken that will keep people from getting irradiated to any substantial degree.

MR. JAMGOCHIAN: We are on a fine line. I just wanted to let you know what was thought about when drafting this. Also, we wanted to be consistent when the EPA Protective Action Guide Manual. Throughout there they talk about appropriate protective measures as well as the old Appendix E. Emergency preparedness has always been conceived as having reasonable assurance to take appropriate protective measures. I think that is why we are having such a hassle with just one word. It is a significant word.

MR. KENNEKE: It is a code word, there is no doubt about it, historically.

COMMISSIONER BRADFORD: Well, adequate is an historical code word, too, just in a different context.

MR. KENNEKE: Well, I offered a suggestion that would give them their choice for that.

COMMISSIONER BRADFORD: I think adequate is broad enough. I don't have the same concern, I guess, that Victor does about the transcript being available as in effect rule-making history. I have a somewhat different concern, which is that it is going to be very hard for anybody to extract from the four different sets of Commissioner remarks anything that they can use very definitively.

COMMISSIONER GILINSKY: Well, it is available to read.

COMMISSIONER BRADFORD: I would use the word "adequate" and would figure that it is broad enough not to need elaboration.

COMMISSIONER GILINSKY: Remind me again about the statutory language that speaks of adequate protection of the public. It is reasonable assurance of adequate protection?

MR. BICKWIT: No. The statutory language is --

COMMISSIONER GILINSKY: Is adequate protection. The regulations speak of reasonable assurance that the public will not be endangered or something like that. I frankly think one puts in reasonable assurance when you are

talking about the public will be protected.

CHAIRMAN AHEARNE: I would argue for just dropping any modifier and just say the protective measures.

COMMISSIONER GILINSKY: Well, that doesn't say anything about what kind of protective measures. You mean reasonable assurance that the public will be protected. Will not be endangered is the standard language of our regulations.

CHAIRMNAN AHEARNE: Reasonable assurance that the public will be protected in the event of a radiological emergency.

Joe, how do you feel about adequately protected?

COMMISSIONER HENDRIE: That is not quite what this says, is it? They says

you want reasonable assurance that measures, appropriate, effective, adequate or just measures can and will be taken in the event of an emergency. You judge that by seeing that there is what is later called an adequate plan, et cetera.

MR. GOLLER: I think you would lose an important part of the plan if you deleted one of these words.

(Laughter.)

CHAIRMAN AHEARNE: We are not going to get past page one if we don't change one of the words.

(Laughter.)

MR. GOLLER: On this point the staff would recommend adequate after having heard this entire discussion. At least in my mind an important part of

that conclusion is that the word "adequate" is used as a follow-up.

CHAIRMAN AHEARNE: In order to move forward I think I will vote for adequate.

I am not sure if you ever voted, Victor.

COMMISSIONER GILINSKY: I don't think I did.

CHAIRMAN AHEARNE: Would you go along with adequate.

COMMISSIONER GILINSKY: Well, let me hear what Joe says.

CHAIRMAN AHEARNE: Two votes for adequate. Victor would like to hear Joe. Joe?

COMMISSIONER HENDRIE: I still think "appropriate" is the right word, but I guess I would settle out if it would get us on. Yes.

CHAIRMAN AHEARNE: Okay, we have got three votes for "adequate."

MR. GOLLER: Mr. Chairman?

CHAIRMAN AHEARNE: Yes.

MR. GOLLER: This discussion has been on a paragraph in the supplemental information.

(Laughter.)

MR. GOLLER: The one that really counts is the regulations. If you look at page 31, for some reason no change was suggested there. I would presume at this point you would want to make the corresponding change in the rule itself.

CHAIRMAN AHEARNE: Do you win many arguments, Carl?

(Laughter.)

COMMISSIONER BRADFORD: You are absolutely right, Carl. Thank you.

CHAIRMAN AHEARNE: Thank you, Carl. On page 31 you say?

MR. GOLLER: Page 31.

CHAIRMAN AHEARNE: Where?

COMMISSIONER HENDRIE: You are on the wrong one.

COMMISSIONER BRADFORD: Page 32. You and I are on the same one.

(Laughter.)

MR. GOLLER: I must say it was curious to me. I was wondering why the same change wasn't made there.

CHAIRMAN AHEARNE: Page 32?

COMMISSIONER BRADFORD: Page 32, (a), line three.

CHAIRMAN AHEARNE: All right, page 2. Peter, you had some changes to page 2.

COMMISSIONER BRADFORD: Just one.

CHAIRMAN AHEARNE: Could I ask the general counsel what is meant by a rebuttable presumption of adequacy?

MR. BICKWIT: It means that is the way the adjudicator is going to go unless somebody comes in and convinces him not to go that way. If FEMA finds that it is adequate, then the NRC will find that it is adequate unelss someone convinces them otherwise.

CHAIRMAN AHEARNE: Rather than starting on neutral ground that is assumed to be true unless proven otherwise, that issue?

MR. BICKWIT: That is right.

CHAIRMAN AHEARNE: Now, the other point, Peter that you have raised is that the issues may be raised in an NRC operating license hearing.

COMMISSIONER BRADFORD: Yes. That is not a new point. That concept is stated further on in the rule. I don't remember exactly where . That doesn't change anything but it does make it explicit.

CHAIRMAN AHEARNE: Standards, any comment?

MR. GOLLER: Well, again, I have to look back at the rule itself.

CHAIRMAN AHEARNE: Carl, let me ask this issue that is raised on page 2. Is your point that it is not in the rule?

MR. GOLLER: The words that are suggested in the rule are different from the words up front.

CHAIRMAN AHEARNE: On which page is that?

MR. GOLLER: On Commissioner Bradford's comment, page 31, which is

the only place these other words appear. We have got to look at that. Page 31.

COMMISSIONER BRADFORD: You are quite right. I guess I would use the language on 31 back there is there is a need to have it be identical. I don't think there is any operative difference.

MR. GOLLER: There is an additional thought in the old words on page 2 which say that these issue may be raised in an NRC operating license hearing.

COMMISSIONER BRADFORD: That thought is in here already. I will have to find it somewhere. I don't think anyone had that before. I certainly had not had the notion that a FEMA finding was not reviewable in an NRC proceeding. I will tell you one place that I derived that from is that

somewhere in the discussion of the rule it says that Congress is considering going further and making FEMA findings not reviewed.

MR. BICKWIT: It would be illegal if the FEMA findings were not reviewed.

CHAIRMANH AHEARNE: I had assumed that it was an issue that could be raised.

MR. GOLLER: Well, in the words that you suggested on page 31, in the rule itself you say are preferable. It seems to me that these words are most appropriate in the rule itself. I am not sure you need them in the supplemental information.

COMMISSIONER BRADFORD: I will tell you the reason I put them up there, and I agree that they have to be in the rule itself, is that when I read the

supplemental information it left me uncertain of what the status of a FEMA finding was in an NRC proceeding and with some question

NUCLEAR REGULATORY COMMISSION
Washington, DC 20555

July 24, 1980

MEMORANDUM FOR: William J. Dircks,
Acting EDO
Carlton Kammerer,
Director,
Congressional Affairs

FROM: Samuel J. Chilk,
Secrektary

SUBJECT: STAFF REQUIREMENTS -
DISCUSSION AND VOTE
ON EMERGENCY PLANNING
RULE (SEE
SECY-80-275, 275A, &
275B, 2:35 P.M.,
WEDNESDAY, JULY 23,
1980, COMMISSIONERS'
CONFERENCE ROOM (OPEN
TO PUBLIC ATTENDANCE)

1. The Commission, by a vote of 3-0*, approved, as revised, the attached draft Federal Register Notice for publication in the Federal Register to be effective 75 days after publication. (SD) (SECY Suspense: 8/7/80)

2. The Commission also requested that:

a. all applicants and licensees be notified of this action;

(SD) (SECY Suspense: 8/7/80)

b. a final finding of no significant impact will be published in the Federal Register prior to the effective date of this regulation:

(SD) (SECY Suspense: 10/21/80)

c. clearance of the record keeping and reporting requirements of the amendment by the Government Accounting Office be obtained.

(SD) (SECY Suspense: 9/22/80)

d. the appropriate Congressional committees be informed of this action.

(OCA/SD) (SECY Suspense: 8/7/80)

Subsequently, the Commission approved the insertion of additional language on page 3 of the Federal Register Notice (see attached OGC enclosure 3).

cc.

Chairman Ahearne
Commissioner Gilinsky
Commissioner Hendrie
Commissioner Bradford
Commission Staff Offices

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*Commissioner Gilinsky was not present when the vote was taken.

[This document reflects the handwritten notes taken during the course of the Commission's rule making session on the emergency planning rule. The handwritten notes were then incorporated into the final version of the emergency planning rule.]

such actions as are appropriate to protect the food ingestion pathway.

2. A new section 50.47 is added.

§ 50.47 Emergency plans.

(a) No operating license for a nuclear power reactor will be issued unless a finding is made by NRC that the state of onsite and offsite emergency preparedness provides reasonable assurance that ~~appropriate~~[1/] adequate protective measures can and

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1/ The crossed out words are the original text of the emergency planning rule that were deleted by the Commission at rule making session of July 23, 1980. The underlined words reflect the handwritten entries that were added to the original text during rule making session.

will be taken in the event of radiological emergency. The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and capable of being implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on a question of adequacy.

(b) The onsite and offsite emergency response plans for nuclear power reactors must meet the following standards:[2]

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[2] These standards are addressed by specific criteria in NUREG-0654; FEMA-REP-1 titled "Criteria for Preparation and Evaluation of

Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants for Interim Use and Comment," January 1980. [Was footnote in original document.])

1. Primary responsibilities for emergency response by the nuclear facility licensee and by State and local organizations within the Emergency Planning Zones have been assigned, the emergency responsibilities of the various supporting organizations have been specifically established, and each principal response ogranization has staff to respond and to augment its initial response on a continuous basis.

2. On-shift facility licensee responsibilities for emergency response are unambiguously defined, adequate staffing to provide initial facility accident response in key functional areas is maintained at all times, timely

augmentation of response capabilities is available, and the interfaces among various onsite response activities and offsite support and response activities are specified.

3. Arrangements for requesting and effectively using assistance resources have been made, arrangements to accommodate State and local staff at the licensee's near-site Emergency Operations Facility have been made, and other organizations capable of augmenting the planned response have been identified.

4. A standard emergency classification and action level scheme, the bases of which include facility system and effluent parameters, is in use by the nuclear facility licensee, and State and local response plans call

for reliance on information provided by facility licensees for determinations of minimum initial offsite response measures.

5. Procedures have been established for notification, by the licensee, of State and local response organizations and for notification of emergency personnel by all response organizations; the content of initial and followup messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

6. Provisions exist for prompt communications among principal response ogranications to emergency personnel and

to the public.

7. Information is made available to the public on a periodic basis on how they will be notified and what their initial actions should be in an emergency (e.g., listening to a local broadcast station and remaining indoors), the principal points of contact with the news media for dissemination of information during an emergency (including the physical location or locations) are established in advance, and procedures for coordinated dissemination of information to the public are established.

8. Adequate emergency facilities and equipment to support the emergency responses are provided and maintained.

9. Adequate methods, systems, and equipment for assessing and monitoring

actual or potential offsite consequences of a radiological emergency condition are in use.

10. A range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public. Guidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place, and protective actions for the ingestion exposure pathway EPZ appropriate to the locale have been developed.

11. Means for controlling radiological exposures, in an emergency, are established for emergency workers. The means for controlling radiological exposures shall include exposure guidelines consistent wiht EPA Emergency Worker and Lifesaving Activity Protective Action Guides.

12. Arrangements are made for medical services for contaminated injured individuals.

13. General plans for recovery and reentry are developed.

14. Periodic exercises are (will be) conducted to evaluate major portions of emergency response capabilities, periodic drills are (will be) conducted to develop and maintain key skills, and deficiencies identified as a result of exercises or drills are (will be) corrected.

15. Radiological emergency response training is provided to those who may be called on to assist in an emergency.

16. Responsibilities for plan development and review and for distribution of emergency plans are

established, and planners are properly trained.

(c) Failure to meet the standards set forth in paragraph (b) of this subsection may result in the Commission declining to issue an Operating License; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that ~~alternative~~ adequate in compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

Generally, the plume exposure pathway EPZ for nuclear power plants shall consist of an area about 10 miles

(16 Km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 Km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled nuclear reactors and

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